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IN THE

SUPREME COURT

OF THE

United States

October Term, 1949

No. 49

HELEN PARKER, et al.,
Petitioners,
vs.
COUNTY OF LOS ANGELES, et al.,
Respondents.

No. 50

JULIA LEARNED STEINER,
Petitioner,
vs.
COUNTY OF LOS ANGELES, et al.,
Respondents.

BRIEF FOR RESPONDENTS

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WESTERN PRINTING COMPANY, WHITTIER

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BRIEF FOR RESPONDENTS

I.

THE FACTS

The respondent Board of Supervisors of the County of Los Angeles did, on the 26th day of August, 1947, adopt the following Oath and Affidavit to be submitted

to each officer and employee under its jurisdiction (S. 17, P. 19):*

"OATH AND AFFIDAVIT

Department .....

A. Oath of Office or Employment

I, ..., do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution and laws of the State of California, against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office or employment on which I am about to enter or am now engaged. So Help Me God.

B. Affidavit re Subversive Activity

I do further swear (or affirm) that I do not advocate, nor am I now a member, nor have I been since December 7, 1941, a member of any political party or organization that advocates the overthrow of the government of the United States, or State of California, or County of Los Angeles, by force or violence, except those specified as follows:

.....

and that during such time as I am an officer or employee of the County of Los Angeles, I will not

*References to the Steiner record will be thus: (S. 1) and to the Parker record thus: (P. 1).

advocate nor become a member of any political party or organization that advocates the overthrow of the Government of the United States, or State of California, or County of Los Angeles by force or violence.

C. Affidavit re Aliases

I do further swear (or affirm) that I have never used or been known by any names other than those listed as follows: ....."

Also included in the document is paragraph "D" (S. 18, P. 20) requiring such officers and employees to indicate whether they have ever been members of or supported any of some 142 named organizations.*

The petitioners, who are employees of the County of Los Angeles, filed a complaint on September 3, 1947 (seven days after the order of the Board of Supervisors adopting the oath and affidavit), seeking an injunction to prevent the respondents from proceeding to ask for information for the limited purpose of ultimately determining whether any of the County personnel personally advocate the overthrow of the government by force or violence. Petitioners also sought declaratory relief.

There was before the trial court petitioners' complaint, respondents' demurrer to the complaint, respondents' motion to strike and petitioners' order to show cause for preliminary injunction. In a memorandum opinion issued by the Honorable Frank G. Swain

*This list of organizations appears in S. 18, P. 20.

in the case of *Steiner v. County of Los Angeles*, Los Angeles Superior Court No. 534117, now 2nd Civ. 16587 (D.C.A.), 88 A.C.A. 487, by minute order adopted in *Parker v. County of Los Angeles*, Los Angeles Superior Court No. 534228, now 2nd Civ. 16588 (D.C.A.), 88 A.C.A. 487, respondents' demurrer was sustained; respondents' motion to strike was placed off calendar and the preliminary injunction denied. A copy of this memorandum opinion is attached as "Exhibit A" to this brief.

There was subsequently before the trial court petitioners' amended complaints (S. 1, P. 1), respondents' demurrer to the amended complaints (S. 23, P. 25), respondents' motion to strike and petitioners' order to show cause for preliminary injunction.

In a memorandum opinion issued by the Honorable Clarence M. Hanson on March 5, 1948 (S. 35, P. 35), respondents' demurrer was sustained without leave to amend. On March 9, 1948, a judgment of dismissal was entered (S. 34, P. 34), and notice of entry of judgment was given on the 10th of March, 1948 (S. 43, P. 43). On March 24, 1948, appellants served and filed notice of appeal (S. 45, P. 45).

The California District Court of Appeal, Second Appellate District, by written opinion (88 A.C.A. 476) (S. 47, P. 47) on November 12, 1948, affirmed the judgments of the Superior Court of the State of California in and for the County of Los Angeles entered March 9, 1948 (S. 34, P. 34), which sustained respon-

dents' demurrer to petitioners' amended complaints without leave to amend (S. 34, P. 34). The Supreme Court of the State of California denied a hearing (S. 49, P. 76).

II.

INTRODUCTORY STATEMENT

The primary question presented is whether the Board of Supervisors of the County of Los Angeles may proceed with a fact-finding program under which the officers and employees within its jurisdiction *are asked:* (P. 49) (1) to take an oath of allegiance to the federal and state constitutions and the laws of California as against all enemies of the United States of America, the State of California, and the County of Los Angeles; and (2) as such officers and employees to answer upon their oath or affirmation, (a) whether or not they advocate the overthrow of the government by force or violence and whether or not since December 7, 1941, they have been members of any organization or political parties that advocate the overthrow of the government by force or violence, as well as to sign an affidavit not to advocate the overthrow of the government by force and violence or to become a member of an organization or political party which so advocates so long as the person is a county officer or employee; (b) to state any aliases they have ever used or been known by; and (c) to indicate whether they have ever been a member of or directly or indirectly

supported any of the organizations listed in the affidavit submitted to them.

The petitioners allege that they are civil service employees of the County of Los Angeles. They further allege that the program of asking petitioners to execute an oath and affidavit must be enjoined and their rights declared as their constitutional guarantees have been violated. The amended complaints contain many allegations of surplusage, but the fundamental question before the court is the right of the respondent Board of Supervisors to proceed with a fact-finding program wherein petitioners are asked to take the oath and execute the affidavit.

We respectfully submit that the relationship between the parties in this litigation precisely defines and controls the rights of the parties involved. The petitioners have alleged that they are employees of the County of Los Angeles. (S. 1, P. 2). It is the County's position that while the petitioners may have the protection of certain constitutional guarantees in their capacity as private individuals, that there are most assuredly many instances where they do not have that protection in their capacity as public servants, and that the petitioners are before this court not as Private Individuals v. Government, but as Public Servants v. The People.

The important basic error in petitioners' position in this litigation is a misinterpretation of what was done under the Board order of August 26, 1947, as dis-

tinguished from what the Board might do in the future. It must at all times be remembered that this lawsuit involves only the validity of the order of the Board of Supervisors of August 26, 1947, which is pleaded by reference in petitioners' amended complaints. This order did not make the execution of the oath and affidavit a condition of employment.

The issue before the court is whether the County can conduct a fact-finding inquiry including the request that County Officers and employees give information relative to advocacy of the forceful overthow of the government they are hired to represent. The issue is not whether the employees will, at some future time after the 26th day of August, 1947, be ordered discharged because of information ascertained, or because of the employee's refusal to give information required.

The issue is whether the County can ascertain the information. It is the County's position that it may ascertain the facts, and that the fact-finding inquiry in itself does not involve any of the petitioners' constitutional rights.

III.

THE ISSUE IS NARROW AND LIMITED

The construction of the state court of the pleadings and Board of Supervisors' order limits the facts to the adoption by the Board of Supervisors by its order of August 26, 1947, of an oath and affidavit to be submitted to County officers and employees without any penalty for failure to execute or penalty because of any information furnished by answer in the oath and affidavit.

The people of the County of Los Angeles, through their elected representatives, the Board of Supervisors, did by order of August 26, 1947, adopt an oath and affidavit to be submitted to the holders of positions in County Government. Petitioners' position is based upon the erroneous assumption that refusal to take the oath and sign the affidavit has been made a ground of discharge (P. 5, S. 4, Petition for Writs of Certiorari; Petitioners' Special Reply, p. 6). This position is contrary to the written letter which is alleged by petitioners to be the order adopted by the Board of Supervisors, copy of which is attached to the complaints, marked Exhibit "A". It is further contrary to the precise terms of the oath and affidavit, the adoption of which by the Board of Supervisors' order of August 26, 1947, is the issue in this litigation. In addition, petitioners' contention is contrary to the specific interpretation contained in the decision of the

highest state court reviewing the Board order and oath and affidavit (P. 59-63, S. 47).

In California, allegations in the body of the complaint as to the contents of a written instrument, a copy of which is attached thereto and which allegations are contrary to the terms of that written instrument are surplusage and are to be disregarded on general demurrer. *Alphonzo E. Bell Corp. v. Bell, etc. Synd.*, 46 Cal. App (2d) 684, 691, 116 P. (2d) 786; *Washer v. Bank of America*, 21 Cal. (2d) 822, 829, 136 P. (2d) 297; *Pimentel v. The Hall-Baker Co.*, 32 Cal. App. (2d) 697, 701, 90 P. (2d) 588; *Bashford v. A. Levy & J. Zentner Co.*, 123 Cal. App. 204, 209, 11 P. (2d) 51; *Peak v. Republic Truck Sales Corp.*, 194 Cal. 782, 790, 230 Pac. 948.

Furthermore, in California, allegations of fact in a body of a complaint contrary to law or impossible in law are not admitted on general demurrer and are surplusage. *Griffin v. County of Colusa*, 44 Cal. App. (2d) 915, 918, 113 P. (2d) 270. Under the order of August 26, 1947, no penalty has been prescribed by the Board of Supervisors for refusal to take the oath or sign the affidavit. Nor has any penalty been prescribed for any employee who states that he is a member of any of the named organizations.

Petitioners have sought certiorari to the Supreme Court of the United States upon the claim:

> "Any county employee, including petitioners, who fails or refuses to execute the Oath and Af-

fidavit *is to be discharged* from county employ (P. 5; S. 4)." Petition for Writs of Certiorari, p. 6) (Italics ours).

Upon the further claim:

"That which the Loyalty Order on its face requires as a condition of employment the County officers have threatened to *enforce by discharge or other penalty.*" (Petitioners' Special Reply Memorandum, p. 7) (Italics ours.)

And upon the further claim:

". . . (T)he portion of petitioners' complaint challenging *per se* the right of the County to require execution of the oath and affidavit on pain of *discharge for refusal to sign.*" (Italics ours) (Petitioners' Special Reply Memorandum, p. 6).

It is respectfully submitted that this is not the issue before this court. It was certainly not the issue in the highest court of the State passing on the question, and that court in its written opinion made this clear by declaring:

"Whether the appointing power will or will not discharge employees as claimed by the plaintiffs, for causes of the character enumerated, and whether the Civil Service Commission will uphold such discharges, if any, on such causes, are not matters upon which this Court may speculate or adjudicate at this time. . . ." (S. 47, P. 63).

The District Court of Appeal further declared:

> "From what has so far been said, it is self-evident that neither the Board nor its agents can discharge a civil service employee for any cause that the Civil Service Commission finds insufficient." (S. 47, P. 59).

The limited nature of the question for review involves solely an order of the Board of Supervisors directing that County officers and employees execute an oath and affidavit relating to the advocacy of the overthrow of government by force or violence, with no penalty specified for failure to execute.

The broad claims by petitioners as to what the County was requiring were pared down by the application of the doctrine of surplusage as set forth in the preceding cases. The issue is not whether the County may delve into thoughts and beliefs of its employees but whether the County may seek information about advocacy of the forceful overthrow of the government by the very people that were hired to represent that government. As the inquiry is restricted to advocacy, and as one may advocate only by writing, speeches, and action, it is idle to argue the issue of delving into thoughts and beliefs as the issue is not present.

The facts before this Court are those facts set forth in precise detail in the decision of the District Court of Appeal of the State of California, which was the highest court of the State passing upon the question. Under California procedure, if the District Court of Appeal relates the facts upon which it has predicated

its opinion and the appellants do not seek a petition for rehearing before the District Court of Appeal urging an error in the facts as related by the District Court of Appeal, these facts become the conceded facts in the litigation, and in a petition for hearing before the Supreme Court of the State of California, those facts alone are the facts upon which that court determines whether it will consider the matter. Therefore, under California procedure, petitioners are, in the balance of this litigation, bound by the recital of facts set forth in the decision of the District Court of Appeal, because they did not file a petition for rehearing urging an error in the facts. Rules on Appeal for the Supreme Court and District Courts of Appeal of the State of California; Rule 29b provides:

> "On petition for hearing, the Supreme Court will not examine the record for error, or inquire into the correctness of the facts stated in the opinion unless the petition shows (1) that material facts were omitted from or incorrectly stated in the opinion of the District Court of Appeal and that the alleged omission or other inaccuracy was set forth in a petition for rehearing and was not corrected by the District Court of Appeal; or (2) that substantial legal issues raised in the brief were not considered in the opinion, and that the failure to consider them was set forth in a petition for rehearing."

The State court's conclusion as to the scope of the Board order and oath and affidavit is binding upon the

Supreme Court of the United States. *Kovacs v. Cooper*, 93 L. ed. (Advanced Opinions) 379, 385; *Saia v. New York*, 334 U. S. 558, 92 L. ed. 1574; *Cox v. New Hampshire*, 312 U. S. 569, 574, 85 L. ed. 1049, 1052; *Winters v. New York*, 333 U. S. 507, 514, 92 L. ed. 840, 849; *Wilson v. North Carolina, ex rel. Caldwell*, 169 U. S. 586, 42 L. ed. 865; *Pennekamp v. Florida*, 328 U. S. 331, 90 L. ed. 1295; *Fox v. Washington*, 236 U. S. 273, 59 L. ed. 573; *Herndon v. Lowry*, 301 U. S. 242, 81 L. ed. 1066.

IV.

NATURE OF OATH AND AFFIDAVIT

The oath and affidavit does not differ substantially from the oath required of officers under Article VI of the United States Constitution. All civilized governments require their officers to take an oath of allegiance, by which the prospective office holder swears to bear true faith and allegiance to the government lawfully selected by the people.

In this country the holder of a position of public trust is required to swear to support the Constitution, the words "the Constitution" being used as representative of the sovereign power which stems from the will of the people. The true spirit, intent, and meaning of the Constitutional oath is to bear true faith and allegiance to the form of government lawfully chosen by the people. It certainly was not the intention that

the officer should merely be required to support the parchment upon which the Constitution was written; nor in taking the oath to support the government does the officer swear allegiance to the individuals who administer it. It is fidelity to the form of government that was organized by the Constitution that is required. Such being the object of the Constitutional oath, the affidavit does not go beyond it and require other conditions. Paragraph "A" of the oath and affidavit follows the general language of the Constitution. Paragraph "B", the second clause, is but an amplification for a more complete expression of the same terms, more fully defining the meaning of the previous clause, expressing in clear language its legal effect. *If the holder of a position of public trust is required to support the Constitution of the United States and this Constitution contains within its terms a procedure for an orderly mode of change, then he cannot advocate a change by force or violence.* Such an advocacy would be directly contrary to the express terms of the Constitution and not in support of the Constitution.

As to Paragraph "D", the California Legislature has determined that certain organizations contain members that advocate the overthrow of government by force or violence. The purpose of Paragraph "D" is to ascertain, first, whether any employees of the County are members of these organizations. If they are not members, then the County would not be required to inquire further into the activities of any

county officer or employee in such organizations to determine whether the employee personally advocated the overthrow of government by force and violence by his personal activity in said organization. Obviously, if after receiving the oaths and affidavits, the County is informed that none of the employees are members of these organizations, it is unnecessary to proceed any further. However, if the affidavits show that some County officers and employees are members of the organizations, then there exists merely evidentiary matter which needs pursuit and clarification by other investigatory means. The County would then have to determine whether or not the employee personally advocated the overthrow of government by force and violence. Obviously, he can only advocate by either speech, writing, or actions, and the County would have to determine and prove by direct evidence that he made speeches or had written articles or had engaged in direct actions personally advocating overthrow of the government by force and violence. In this respect, membership is meaningless. There could be an organization having one hundred members, 99 of whom advocated the overthrow of government by force or violence. One public employee might have joined the organization with the sole purpose of converting the 99 members to precisely the opposite view. On the other hand, he might have joined an organization having a hundred members of whom five advocate the overthrow of government by force or violence and

after a period of thirty days be converted by the five and personally advocate the overthrow of government by force or violence.

Therefore, the membership is but the evidentiary lead which, if it exists, must then be followed by the people to its source to determine the personal advocacy of each employee.

A. There Is No Imputation of "Guilt by Association."

Guilt by association is the determination that a man is judged by the company which he keeps. If the company is bad, he must be bad. There is no imputation of such guilt in the Board of Supervisors' order of August 26, 1947. There is no inference that the listed organizations are subversive. There is no inference that appellants are subversive if they belong to every organization listed. An employee can indicate membership in every organization listed, and he will still be employed and he will not be "publicly" reported or "discharged" or penalized.

The oath and affidavit is not a "test" oath as referred to in *Cummings v. Missouri*, 71 U. S. 277, 18 L. ed. 356, and *Ex Parte Garland*, 71 U. S. 333, 18 L. ed. 366. There, the State in effect said to the person seeking the public office, "If you were ever in the Confederate Army, you cannot work for the government." Therefore, in the *Cummings and Garland* cases, the court was considering the type of an oath which was phrased in such language that the applicant

for public office could not execute it if he had done a certain thing in the past.

This is precisely contrary to the oath and affidavit adopted by the Board of Supervisors. The letter pleaded as a part of Exhibit "A" to the amended complaints states affirmatively and specifically:

> " . . . (W)e wish to make it clear that the mentioning of the name of an organization in these reports does not necessarily mean and is not intended to convey the implication that they are subversive . . . " (P. 17, S. 16).

and

> "By way of summary, it is to be emphasized that the organizations set forth in the list, which is part of the affidavit, that by their designation there it is not intended to infer that they are necessarily subversive or Communistic, . . . " (P. 18, S. 16).

There is, therefore, no guilt by association but merely an executive order of the governing Board of the County seeking information which may be used as an evidentiary lead to later determine from other evidence whether or not the employee personally advocates the overthrow of government by force or violence.

The people of the County of Los Angeles have proceeded upon the theory that the public office holders and employees who are acting as their representatives have no protected constitutional right to actually over-

throw by force or violence the form of government lawfully chosen by the people. The people are asking their representatives to execute an oath and affidavit that they will not, while holding positions as public agents, advocate the overthrow by force or violence of the government that they are representing.

V.

PETITIONERS ARE BEFORE THIS COURT SEEKING A REVIEW OF THEIR RIGHTS STEMMING FROM THEIR STATUS AS HOLDERS OF POSITIONS OF PUBLIC TRUST AND NOT THEIR CONSTITUTIONAL RIGHTS AS PRIVATE CITIZENS.

This is a law suit between the people of the County of Los Angeles and their representatives.

The crux of this case turns on the status of the petitioners. The petitioners are before this court not as private citizens but as holders of positions of public trust.

This status cannot be overemphasized.

The petitioners allege that they are "in the classified Civil Service (of the County of Los Angeles) with permanent status." (S. 1, P. 2).

This permanent cadre of public officers and employees in the civil service (of which petitioners are a

part) is a political invention of the 19th century. These individuals are not chosen by the people. They are not directly accountable to the people. Of the 22,000 positions in the public service of the County of Los Angeles, only eight are elective officials. All other persons exercising powers granted by the Charter of the County of Los Angeles or the statutes of the State of California possess permanent Civil Service status. Those few officers who are politically responsible for their actions find their work thrown back more and more into the field of broad general policy. The implementation of that policy they must leave to the permanent cadre of Civil Service. As a result, there springs into existence a vast body of officials and employees with executive powers, who, in a greater part of their work, operate under no effective responsibility to the people. This body of public employees constitutes a potential threat of arbitrary action by simply abusing the power that it has. This cadre may, if it wishes, exercise a tacit veto upon any measure desired by the people which is displeasing to it simply by refraining from putting it into effect. This it can oftentimes do without the public being aware of its activity merely by confusing the issue in a welter of red tape, contradictory rulings, and shirking responsibility. (Reference: Section 645, "Government by Merit" by Lucius Wilmerding, Jr.).

The United States Supreme Court has recognized the existence of this unfortunate possibility. Mr.

Justice Douglas dissenting in *United Public Workers v. Mitchell,* 330 U. S. 75, 91 L. ed. 754, but concurring in the validity of the Hatch Act as to administrative employees of the United States Civil Service, declared, at page 784:

> "The civil service system has been called 'the one great political invention' of nineteenth century democracy. The intricacies of modern government, the important and manifold tasks it performs, the skill and expertise required, the vast discretionary powers vested in the various agencies, and the impact of their work on individual claimants as well as on the general welfare *have made the integrity, devotion, and skill of the men and women who compose the system a matter of deep concern of many thoughtful people.* Political fortunes of parties will ebb and flow; top policy men in administrations will come and go; new laws will be passed and old ones amended or repealed. But those who give continuity to administration, those who contribute the basic skill and efficiency to the daily work of government, and those on whom the new as well as the old administration is dependent for smooth functioning of the complicated machinery of modern government are the core of the civil service. If they are beneficiaries of political patronage rather than professional careerists, serious results might follow—or so Congress could reasonably believe. Public confidence in the objectivity and integrity of the civil service system might be so weakened as to jeopardize the effectiveness of administrative government." (Italics ours.)

The prevention of concentration of power in public officials and employees who could use this power in an arbitrary manner without accountability to the people was one of the main motivating factors in the Constitutional Convention.

Excerpts from "The Making of the Constitution" by Charles Warren make this clear:

"Madison said that he 'considered the popular election as essential to every plan of free government. . . . '" (Page 160).

"'He wished for vigor in the government, but he wished that vigorous authority to flow immediately from the legitimate source of all authority. The government ought to possess, not only, first, the force, but secondly, the mind or sense of the people at large. The Legislature ought to be the most exact transcript of the whole society. Representation is made necessary only because it is impossible for the people to act collectively.' Mason said that in the new government the people and not the States will be represented. 'They ought, therefore, to choose the representatives. The requisites in actual representation are that the representatives should sympathize with their constituents, to think as they think and feel as they feel, and that for these purposes should even be residents among them.'" (Page 162).

"'They (the representatives) are of the People and return again to mix with the People, having no more durable pre-eminence than the different grains in an hourglass; such an Assembly cannot

easily become dangerous to liberty; they are the servants of the People, sent together to do the People's business' so wrote Franklin in picturesque language (Franklin to Whatley, May 23, 1788)" (Page 163).

"Fear of a return of Executive authority like that exercised by the Royal Governors or by the King had been ever present in the states from the beginning of the Revolution." (Page 173).

" 'That all power is vested in, and consequently derived from the people, that magistrates are their trustees and servants and at all times amenable to them. . .' " (Page 349).

" 'Having for his primary object, for the polestar of his political conduct, the preservation of the rights of the people, he held it as an essential point, as the very palladium of civil liberty, that the great officers of state and particularly the Executive, should at fixed periods return to that mass from which they were at first taken, in order that they may feel and respect those rights and interests which are to be again personally valuable to them.' " (Quoting from Mason). (Page 363).

"This view (see quote above from Mason) was shared by Dr. Franklin who said that 'in free Governments, the rulers are the servants, and the people their superiors and sovereigns. . .' " (Page 364).

Actually whether a public officer or employee will be a servant of the people or a master depends upon what he advocates. That he has power to be a master is undeniable. For example: A judge is selected by the people, and immediately upon taking office has

the *power* to sentence any one of the citizenry to the penitentiary. A deputy sheriff is selected on behalf of the people, and immediately upon taking office he may arrest any one of the very people authorizing his employment. A fireman may enter the premises of any one of the citizenry and destroy his property for the purpose of preventing fire. The health department employee has the power to quarantine any one of the citizenry. The agricultural inspectors have the power to condemn trees and crops belonging to any citizen. A deputy assessor has the power to enter the premises of a citizen and determine the assessed valuation. A building inspector may stop construction of a citizen's home.

If the office holder uses this power properly, he is a public servant. If he uses it improperly, he is a master of the very people who gave him the power.

Because of the fact that the people of this county authorize the employment of persons who have the possibility of becoming the masters of the very people who authorize their employment, the citizens have the right to know whether or not their employees are now acting and will continue to act as public servants and conform to the principles of our guaranteed form of government, or whether these agents will embark upon a program to destroy and overthrow by force or violence the very form of government that they were appointed by the citizenry to administer and protect.

To allow a County employee to prevent the citizens of the County of Los Angeles from asking information

relating to his qualifications as a county employee by the simple device of hiding behind the claim that his alleged civil rights, not as an employee but as a private citizen, have been violated, gives to that public employee the claim of infallibility. The invocation of the doctrine of infallibility of holders of positions of public trust is the beginning of totalitarian government, wherein the citizen is entirely subordinated to the state.

Public servants are charged with the duty and charged with the public trust of representing the citizens of the government by whom they are employed, and these citizens are entitled to know whether a public servant intends to breach this trust.

> "When a man assumes a public trust he should consider himself a public property." Thomas Jefferson from "Rayner's Life of Jefferson," p. 365.

If we have arrived at a point where the citizens cannot examine into the operation of their government by inquiring into the actions and conduct of their representatives, who may advocate and work toward and may upon the first opportunity engage in the overthrow of government by the use of force, we have ceased to have a form of government of the people, by the people, and for the people.

Government should be responsible to the will of the people. *Stromberg* v. *California,* 283 U. S. 359, 75 L. ed. 1117; *West Virginia State Board of Education* v. *Barnett,* 319 U. S. 624, 87 L. ed. 1628; *Terminiello* v. *Chicago,* 337 U. S. 1 (preliminary print) 93 L. ed. Advanced Opinions (No. 15) 865.

The protection to the people against a concentration of power in public officials and employees who could use this power in an arbitrary manner without accountability to the people lies in the rights of the people and the duties of the employees under the employment contract and the requirements of the Constitution.

VI.

RESPONDENTS' POSITION

Summary

Petitioners, who are holders of positions of public trust, claim that the mere order of the Board of Supervisors adopting the oath and affidavit violates their civil rights on the ground that their constitutional rights of freedom of speech and due process, as preserved by the First and Fourteenth Amendments, are violated. The answer of the people is predicated upon three distinct grounds: A. Implied Contract, B. Constitutional Exercise of Police Power, C. Affirmative Constitutional Grant of Power.

Each or any one of these three separate premises will establish that the petitioners have the duty to actually execute the oath and affidavit. Obviously if their constitutional rights are not impaired by the duty to actually execute the oath and affidavit, then their rights are most certainly not impaired by being asked to execute such an oath and affidavit.

A. Implied Contract.

Petitioners' constitutional right (assuming that it exists) to advocate forceful and violent overthrow of the government that they are hired to represent and to refuse to give information on this subject is suspended by the implied terms of their contract of employment.

1. Petitioners, as County employees, impliedly covenant that they will not advocate destruction by force or violence of their government employer.

2. Petitioners, as County employees, also covenant that the people have the right and duty to ascertain if petitioners, as their representatives, advocate the overthrow of the government by force or violence and petitioners have agreed to give information to the people as to whether they so advocate.

3. Obviously, if the petitioners have contracted that they will not advocate the overthrow by force or violence of the government that they are hired to represent and that they will give the people information pertaining to this subject, then the petitioners cannot complain that the submission to them of an oath and affidavit giving them an opportunity to abide by their contract violates their constitutional rights.

4. The right to determine that these implied covenants are qualifications for state positions is a power reserved to the states.

5. Petitioners' cases distinguished.

B. Constitutional Exercise of Police Power.

Assuming no implied covenant to abstain from overthrowing the government by force or violence, and to give information on this subject, and further assuming that the constitutional guarantees of freedom of speech and due process under the First and Fourteenth Amendments apply to petitioners, their constitutional rights have not been violated because the oath and affidavit program is a proper exercise of the police power.

1. The constitutional guarantee of freedom of speech assured against Federal law in the First Amendment and against State action in the Fourteenth Amendment is not absolute.

2. The State may, in the exercise of its police power, prevent its destruction so long as (a) the state action bears appropriate relation to the safety of the state; (b) it is not vague and indefinite; (c) the clear and present danger rule is satisfied.

a. The State action bears appropriate relation to the safety of the state.

b. The oath and affidavit adopted by the Board of Supervisors by order of August 26, 1947, is not vague and indefinite.

(1) Theory of denial of due process because of vague and indefinite standards applies only where there is an exaction of obedience.

(2) Assuming there is a compulsion on petitioners to answer, the language of the oath and affidavit has a well-recognized meaning.

(3) The interpretation of the Board order by the highest court of the State reviewing the matter should be given consideration.

c. The oath and affidavit meets the clear and present danger test, if that is applicable.

(1) The clear and present danger rule applies to state *action*, not to state *inquiry*.

(2) As holders of positions of public trust are possessed of a tremendous power over the private citizenry, then if the public servant advocates forceful overthrow of the government chosen by the people whom the public servant is hired to represent, an inherent clear and present danger exists.

(3) Here the state has determined that advocacy of overthrow of the government by force or violence by holders of positions of public trust constitutes a clear and present danger of such substantive evil that it should be prevented by exercise of the police power.

(4) The "clear and present danger" relates to the evil of advocacy of violent overthrow of the government by an employee thereof, and such advocacy is one of the substantive evils which the people have the right to prevent.

C. Affirmative Constitutional Grant of Power.

There is an affirmative grant of power to the people in Article VI, Clause 3, of the United States Constitution to require oaths of holders of positions of public trust.

We shall now discuss these points in the order named:

A. Implied Contract.

Petitioners' constitutional right (assuming that it exists) to advocate forceful and violent overthrow of the government that they are hired to represent and to refuse to give information on this subject is suspended by the implied terms of their contract of employment.

1. Petitioners, as County employees, impliedly covenant that they will not advocate destruction by force or violence of their government employer.

This principle of law is so firmly established in American Jurisprudence that no effort will be made to digest a series of independently cited cases. As stated in 35 *Am. Jur.* at p. 514 under the subject of "Employee's Duty to Employer," the principle is set forth as follows:

> "Aside from any duties expressly imposed upon or undertaken by the employee in the contract of employment, the law implies various obligations and undertakings by an employee in entering into a contract of employment. It implies an under-

taking on his part that he is competent to perform the duties for which he is hired, and is possessed of the requisite skill and knowledge to enable him to do so, and that he will do that work in a careful and workmanlike manner; that he will yield obedience to all reasonable rules, orders and instructions of the employer; and that he will conduct himself with sobriety and such decency and propriety of deportment as not to work injury to the business of his employer. *The law implies an agreement on the part of the servant or employee to faithfully serve and be regardful of the interest of his employer during the term of his service,* carefully discharge his duty to the extent reasonably required by the relation of employer and employee, and to treat his employer with respect." (Italics ours.)

Please also see 39 *Corpus Juris,* page 82 under the title, "Adverse or Disloyal Interests of Employee." Therein it is stated:

"One who asserts an interest adverse or disloyal to his employer commits a breach of the implied condition of the contract of employment subjecting him to discharge."

The Court stated in *Brown et al.* v. *Dupuy,* 4 Fed. (2d), 367 at 368-369:

"2 Williston on Contracts, sec. 1022, p. 1923, lays down the rule that: 'The duty of fidelity to his employment imposes on the employee not simply the positive duty of reasonably skillful performance of the work intrusted to him, but the

negative duty of refraining from deception, and from entering into relations giving him an interest inconsistent with that of the employer. Thus deceptive and fraudulent statements or conduct not only renders the employe liable, but justifies his discharge.' "

Again in *Miller* v. *Jones*, 178 Iowa 168, 159 N. W. 671, at 672, the court stated:

". . . It was not necessary that plaintiff's misconduct should have, in fact, injured the defendant. It was enough that it had the tendency, or might reasonably have led to his injury. Defendant did not have to wait until injury was done before discharging the plaintiff. If plaintiff's conduct was such as to indicate that his interests were hostile to those of his master, it was the right of the master to discharge him before any injury was in fact done . . . It is well settled that a servant must do nothing in hostility to his master's interests. If he defrauds his master, or attempts to do so, or lends himself to aid others in defrauding him, or exposes the master to danger of loss even though none is in fact sustained, the master may discharge him for violation of an implied condition of his contract; and so the master may discharge him if he places himself in relations with others that are inconsistent with his duties to the master, or such as to jeopardize his interests. *Adams Express Co.* v. *Trego*, 35 Md. 47; *Deane* v. *Cutler* (Super. Ct.) 20 N. Y. Supp. 617."

Also see *Osburn* v. *De Force*, 122 Ore. 360, 257 Pac. 685, wherein it was said, at 689:

"Every contract of employment implies an engagement on the part of the employee to be faithful to his employers' interests and loyal to his employers."

In the case of *Puritas Laundry Co.* v. *Green*, 15 Cal. App. 654, 115 Pac. 660, it is stated, at 15 Cal. App. 660:

"'Manifestly, when a servant becomes engaged in a business which necessarily renders him a competitor, a rival of his master, no matter how much or how little time he devotes to it, he has an interest against his duty. It would be monstrous to hold that the master was bound to retain the servant in his employment after he has thus voluntarily put himself in an attitude hostile to his master's interests.' (*Dieringer* v. *Meyer* 42 Wis. 311, 24 Am. Rep. 415. . .)"

These general principles establishing the proposition that all employees impliedly covenant that they will not destroy their employer are carried forward with complete force into the relationship of public employee and government. We can conceive of no greater attempt by an employee to destroy his employer's business than that of a public servant who actually advocates use of force or violence to overthrow the very government by whom he was employed.

The advocacy of overthrow of constitutional government by force or violence by an employee of that government is a breach by the employee of the relationship of government employer and public servant employee.

It is universally held "a public officer is impliedly bound to exercise the powers conferred upon him with disinterested skill, zeal, and diligence, and primarily for the benefit of the public." (*Hornung v. State*, 116 Ind. 458, 19 N. E. 151, at 153.)

> "Dealings between a public officer and himself as a private citizen which bring him into collision with the other citizens equally interested with himself in the integrity and impartiality of the officer are against public policy. *Goodyear* v. *Brown*, 155 Pa. 514, 26 A. 665, 20 L. R. A. 838, 35 Am. St. Rep. 903." *Noble* v. *City of Palo Alto*, 89 Cal. App. 47, 264 Pac. 529, at 531.
>
> "Nevertheless, the organization and activity in organizations of public officers and employees is subject to some regulation for the public welfare. See United Public Workers v. Mitchell, 330 U. S. 75, 67 S. Ct. 556, 91 L. Ed.—; Oklahoma v. United States Civil Service Commission, 330 U. S. 127, 67 S. Ct. 554, 91 L. Ed. —; King v. Priest, Mo. Sup., 206 S. W. 2d 547, and cases therein cited. This is because a public officer or employee, as a condition of the terms of his public service, voluntarily gives up such part of his rights as may be essential to the public welfare. . . . " *City of Springfield* v. *Clouse*, 356 Mo. 1239, 206 S. W. (2d) 539, at 542.

As to public officers and employees, 21 *Cal. Jur.* 892 states the rule:

> "The mere acceptance of an office, however, carries with it the obligation to exercise good faith

and diligence even in the absence of express provision upon the subject."

There is little doubt of the principle that a public employee may not retain his status and simultaneously advocate the destruction of his employer. The case of *Pawell* v. *Unemployment Compensation Bd. of Review*, 146 Pa. Super. 147; 22 Atl. (2d) 43 in speaking of the status of a public employee states, at p. 45:

> "In every employment there are implied covenants and conditions in addition to those specifically appearing in the contract. The ordinary virtues of honesty and loyalty are assumed. One may be dishonest in other than money matters and in general it hardly can be said that an employee who is awaiting the occasion to destroy his employer's business . . . has not violated his implied covenant of reasonable loyalty, . . ."

2. Petitioners, as County employees, also covenant that the people have the right and duty to ascertain if petitioners, as their representatives, advocate the overthrow of the government by force or violence and petitioners have agreed to give information to the people as to whether they so advocate.

The California courts have made it very clear that in California the employment contract implies the covenant by the public servant that the people may inquire of their employees to determine whether such employees have breached their contract.

In *Perez v. Board of Police Commrs.*, 78 Cal. App. (2d) 638 (178 P. 2d 537), it was stated, at p. 651, in affirming the right of the city to prevent union membership of policemen:

> "All public officials, whether national or state, executive, administrative or judicial, and all public employees, are public servants. There is but one master, the people. Hence, the common expression that, 'This is a government of laws and not of men.' The allegiance of all public servants is to the people; obviously there can be neither alienation nor division of this allegiance if constitutional government is to continue. *The police commission, therefore, not only had the power but it was the manifest duty to adopt and enforce the resolution herein considered.* (Resolution preventing union membership). The failure to do so in effect would have amounted to a surrender of power, a dereliction of duty, and a relinquishment of supervision and control over public servants it was their sworn duty to supervise and direct." (Italics ours.)

Likewise, in *Hayman v. City of Los Angeles*, 17 Cal. App. (2d) 674 (62 P. (2d) 1047), the court stated at 678:

> "He (the discharged employee of the City of Los Angeles) seeks to justify his activities (soliciting union membership from city employees) upon the ground of his constitutional right of freedom of speech and assembly. The right which is in-

volved here is not that which petitioner thinks has been denied him, but is the right of respondents to exercise a reasonable supervision over city employees, to the end that proper discipline may be maintained and that activities among employees be not allowed to disrupt or impair the public service. *Such is not only the right but the duty of the city and its several departments.* In the exercise of this duty they must be allowed a wide discretion and their acts are not subject to review by the courts until they have reached the point of illegality." (Italics ours.)

The Supreme Court of California has held that the people have the right to use a test for the purpose of ascertaining information from those seeking public office. This principle is declared in *Communist Party v. Peek*, 20 Cal. 2d 536 (127 P. 2d 889) at p. 551:

> "There is no doubt, however, that the remainder of section 2540.4 comes within the Legislature's power to prescribe tests and conditions for participation in primary elections. *This power certainly includes the right to adopt tests designed to exclude those political parties advocating the overthrow of the government by unlawful means or those parties carrying on a program of sabotage, force and violence, sedition or treason.*" (Italics ours.)

The same rule applies to doctors (*Hawker v. New York*, 170 U. S. 189, 42 L. ed. 1002) and attorneys (*In re Summers*, 325 U. S. 561, 89 L. ed. 1795).

The high courts of other states have found that this implied covenant of inquiry of public servants exists in the people. In the case of *Kennett v. Barber*, 159 Fla. 81, 31 So. 2d 44, the Supreme Court of Florida was examining a situation wherein a city fireman was discharged for conduct unbecoming an employee of the city because outside of office hours, while intoxicated he had grabbed the arm of his pregnant wife, thrown her to the ground and then proceeded to bruise, beat and batter a second woman. In discussing the city's right to inquire into the employee's conduct the court stated:

> "By this yardstick *the City of Miami Beach would certainly be authorized to inquire* into the private character and conduct of a member of its Fire Department, and determine whether it met the standard required of those who seek employment at its hands. *After they are employed one's character is subject to inspection at all times.* No business is required to keep one in its employ who is known to be stealing, cheating, gambling or who is guilty of other conduct embarrassing to or inimical to the interest of his employer." (Italics ours.)

For right to inquire of Federal employees, please see the case of *United States v. Marzani*, 71 Fed. Supp. 615 (affirmed in 168 F. 2d 133, affirmed by divided court in 93 L. ed, Advanced Opinions 196.), wherein it is stated at p. 620:

"One of the authorized functions of governmental departments and agencies, particularly in time of war, *is to see that their employees are loyal to our democratic form of government and no other.*" (Italics ours.)

The right involved here is not the constitutional right of freedom of speech but the right of the government to exercise a reasonable supervision over public employees. *Washington v. Clark,* 84 Fed. Supp. 964; *Communist Party v. Peck,* 20 Cal. (2d) 536, 127 P. (2d) 889.

It is equally clear in California that the public servant contract includes the implied covenant of the public employee to answer to the people, when inquiry is made, as to his advocacy of forceful overthrow of his government employer.

Duty requires the public servant employee to take an oath and sign an affidavit seeking only information which will constitute a factual lead whereby the government might determine whether he advocates its overthrow by force or violence.

In *Christal v. Police Commission,* 33 Cal. App. (2d) 564, at p. 568 (92 P. 2d 416) the court said:

"As we view the situation, when pertinent questions were propounded to appellants before the grand jury, the answers to which questions would tend to incriminate them, they were put to a choice which they voluntarily made. *Duty required them to answer.* Privilege permitted them to refuse to

answer. They chose to exercise the privilege, but the exercise of such privilege was wholly inconsistent with their duty as police officers. They claim that they had a constitutional right to refuse to answer under the circumstances, but it is certain that they had no constitutional right to remain police officers in the face of their clear violation of the duty imposed upon them. (*McAuliffe v. Mayor of New Bedford*, 155 Mass. 216 (29 N. E. 517).)" (Italics ours.) (Please also see *Congress of Industrial Organ. v. City of Dallas*, 198 S. W. (2d) 143).

It is respectfully submitted that the authorities in this point have established:

First, that the advocacy of overthrow of government by force and violence by an employee thereof is contrary to the implied-in-law covenant in his contract with the people.

Second, that the people have by this implied contract the right and duty to determine if their representatives in the permanent civil service presently advocate the overthrow of the government by force and violence.

Third, that the petitioners as holders of positions of public trust have the duty under the terms of their contract to give information to the people as to whether they so advocate.

3. Obviously, if the petitioners have contracted that they will not advocate the overthrow by force or

violence of the government that they are hired to represent and that they will give the people information pertaining to this subject, then the petitioners cannot complain that the submission to them of an oath and affidavit giving them an opportunity to abide by their contract violates their constitutional rights.

Petitioners' position is like that of a movie extra player who agrees as a condition of her employment contract that she will remain within a certain area and keep her employer advised of her whereabouts, then when her employer makes inquiry of her whereabouts she immediately complains that her constitutional guarantees of freedom of travel and freedom of speech are being violated.

In the instant case, petitioners wish to refuse to perform their contractual duties but notwithstanding remain holders of positions of public trust.

Petitioners' rights must be determined pursuant to the implied covenants of their employment contract. Petitioners' constitutional rights as private citizens not subject to such a contract are not in issue.

Petitioners' theory rests entirely upon the presumed existence of unlimited constitutional rights. However, petitioners' unlimited constitutional rights are suspended while they are subject to their contract.

As early as 1892 this doctrine was recognized. In the case of *McAuliffe v. Mayor, etc., of City of New Bedford,* 155 Mass. 216, 29 N. E. 517, Mr. Justice

Holmes, then sitting on the Supreme Court of Massachusetts, had before him a petition for mandamus to restore the petitioner to the office of policeman in the City of New Bedford. The petitioner had been removed by the Mayor after a hearing because he violated a rule which read (p. 517):

> "'No member of the department shall be allowed to solicit money or any aid, on any pretense, for any political purpose whatever.' *There was also evidence that he had been a member of a political committee, which likewise was prohibited.*" (Italics ours.)

Mr. Justice Holmes stated, at p. 517:

> ". . . It is argued by the petitioner that the mayor's finding did not warrant the removal; that the part of the rule violated was invalid, as invading the petitioner's right to express his political opinions; . . . One answer to this argument . . . is that there is nothing in the constitution or the statute to prevent the city from attaching obedience to this rule as a condition to the office of policeman, and making it part of the good conduct required. The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. *There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech as well as of idleness by the implied terms of his contract.* The servant cannot complain, if he takes the employment on the terms

which are offered him. On the same principle the city may impose any reasonable condition upon holding offices within its control." (Italics ours.)

The California courts have made clear the suspension of the public employee's right to advocate the overthrow of the government that he was hired to represent and the suspension of his right to remain silent in relation to this advocacy.

In the case of *Christal* v. *Police Commission*, 33 Cal. App. (2d) 564, 92 P. (2d) 416 petitioners, who were formerly policemen of the City and County of San Francisco, sought by mandamus to be reinstated to their positions. The cause of petitioners' removal was predicated upon the fact that they were subpoened to appear before the grand jury and they refused either to produce their private records or to answer questions before the grand jury concerning their assets and income; and they further refused to testify concerning their acts and conduct. The court stated at page 567:

". . . The main question involved is whether appellants, while holding positions as police officers, could exercise the constitutional privilege of refusing to testify before the grand jury under the circumstances and still insist upon retaining their positions as police officers. . . . We need not further discuss the nature of said privilege here as it is conceded by all that said officers could exercise that privilege in any proceeding. We are concerned here only with the result

of the exercise of such privilege, by those holding the positions of police officers, in an investigation by which it was sought to determine whether such officers had been guilty of criminal activities in connection with their duties as police officers."

The court further stated on page 568:

"We are not unmindful of the constitutional privilege above mentioned which may be exercised by all persons, including police officers, in any proceeding, civil or criminal. (*In re Lemon, supra* (15 Cal. App. (2d) 82); *In re Hoertkorn, supra* (15 Cal. App. (2d) 93)). As we view the situation, when pertinent questions were propounded to appellants before the grand jury, the answers to which questions would tend to incriminate them, they were put to a choice which they voluntarily made. Duty required them to answer. Privilege permitted them to refuse to answer. They chose to exercise the privilege, but the exercise of such privilege was wholly inconsistent with their duty as police officers. They claim that they had a constitutional right to refuse to answer under the circumstances, but it is certain that they had no constitutional right to remain police officers in the face of their clear violation of the duty imposed upon them. (*McAuliffe v. Mayor of New Bedford*, 155 Mass. 216 (29 N. E. 517). We are of the opinion that such a violation of duty would constitute cause for dismissal even in the absence of any specific rule requiring such officers to give testimony before the grand jury, or of any specific

rule relating to 'conduct unbecoming an officer.' That such conduct constituted 'conduct unbecoming an officer,' there can be no doubt."

On page 569 the court stated:

"There is nothing startling in the conception that a public servant's rights to retain his office or employment should depend upon his willingness to forego his constitutional rights and privileges to the extent that the exercise of such rights and privileges may be inconsisent with the performance of the duties of his office or employment. One of the most cherished rights guaranteed by the Constitution is that of freedom of speech, yet no one would maintain that a police officer could fully exercise that right without violating the duties imposed upon him by the acceptance of his employment as a police officer. The right of freedom of speech might be relied upon by a police officer who had disclosed to persons conducting an illegal establishment, information concerning the plan of the police department to conduct a raid upon such establishment, but the furnishing of such information would be inconsistent with and violative of the duties of such police officer. Such conduct would constitute cause for dismissal with or without any specific rule on the particular subject, and in the event of the adoption of a rule providing for dismissal of any officer making such disclosure, the claim that such rule violated any constitutional right of the officers would be clearly untenable."

Public employees do not enjoy the same freedom that they would have as private citizens. *Bell v. District Court of Holyoke*, 314 Mass. 622, 51 N. E. (2d) 328.

4. The right to determine that these implied covenants are qualifications for state positions is a power reserved to the states.

> "No precise limits have been placed upon the police power of a state, and yet it is clear that legislation which simply defines the qualifications of one who attempts to practice medicine is a proper exercise of that power. . . ." *Hawker v. State of New York*, 170 U. S. 189, 42 L. ed. 1002, at 1004.
>
> ". . . (T)hat among the rights reserved to the states is the right of each state to determine the qualifications for office, and the conditions upon which its citizens may exercise their various callings and pursuits within its jurisdiction." (*Cummings v. Missouri*, 71 U. S. 277, 18 L. ed. 356, at 361.

(Please also see *Bridges v. California*, dissent, 314 U. S. 252, 86 L. ed. 192, 213; *Dent v. State of West Virginia*, 129 U. S. 70, 32 L. ed. 623; *Taylor v Beckham*, 178 U. S. 548, 44 L. ed. 1187; *United Public Workers, v. Mitchell*, 330 U. S. 75, 91, L. e .. 754. Government has the right to prescribe qualifications of its employees and attach conditions to their employment. *Friedman v. Schwallenbach*, 159 F. (2d) 22.)

5. Petitioners' case distinguished:

All of petitioners' cases cited in support of petitioners' contention relate to situations wherein the governmen was by penal staute *preventing a private citizen* from speaking, writing or circulating pamphlets, etc.; or *compelling a private citizen* to obtain a permit before doing a lawful act or compelling a private citizen to pledge allegiance to the flag, etc. Illustrative of these cases are:

Hague v. *C. I. O.*, 307 U. S. 496, 83 L. ed. 1423; *Herndon* v. *Lowry*, 301 U. S. 242, 81 L. ed. 1066; *Lovell* v. *Griffin*, 303 U. S. 444, 82 L. ed. 949; *Martin* v. *Struthers*, 319 U. S. 141, 87 L. ed. 1313; *Murdock v. Pennsylvania*, 319 U. S. 105, 87 L. ed. 1292; *Near* v. *Minnesota*, 283 U. S. 697, 75 L. ed. 1357; *Schneider* v. *Irvington*, 308 U. S. 147, 84 L. ed. 155; *Schneiderman* v. *United States*, 320 U. S. 118, 87 L. ed. 1796; *Thomas* v. *Collins*, 323 U. S. 516, 89 L. ed. 430; *Thornhill* v. *Alabama*, 310 U. S. 88, 84 L. ed. 1093; and *West Va. State Bd. of Edu.* v. *Barnett*, 319 U. S. 624, 87 L ed. 1628.

There are three fundamental differences between these cases and the case at bar.

First, there was *no implied contract* containing limitations upon the representatives of the people.

Second, there is in this case *no compulsion* on the private citizen to enter public employment and become subject to the contractual relationship; and

Third, there is *no permanent restraint.*

The relationship between the holder of a position of public trust and the people is purely voluntary on behalf of the office holder. The public employee may, in an instant, restore his suspended constitutional rights by relieving himself of his contractual duties and responsibilities. The case at bar is governed completely by the principles set forth in *Hamilton* v. *University of California*, 293 U. S. 245, 79 L. ed. 343 (approved in *West Virginia State Board of Edu.* v. *Barnett*, 319 U. S. 624, 87 L. ed. 1628.) In that case the University refused to grant an exemption from the requirement that certain students take military training. The students declined to take the prescribed course; and, solely upon that ground, they were suspended from the University. They attacked the validity of the requirement on the ground that it violated the Fourteenth Amendment.

This court declared, at p. 352:

> "California has not drafted or called them to attend the university. They are seeking education offered by the State and at the same time insisting that they be excluded from the prescribed course solely upon grounds of their religious beliefs and conscientious objections to war, preparation for war, and military education. Taken on the basis of the facts alleged in the petition, appellants' contentions amount to no more than an assertion that the due process clause of the Fourteenth Amendment as a safeguard of 'liberty' confers the right to be students in the state university free from

obligation to take military training as one of the conditions of attendance."

And Mr. Justice Cardozo concurring:

"If they elect to resort to an institution for higher education maintained with the state's moneys, then and only then they are commanded to follow courses of instruction believed by the state to be vital to its welfare."

If petitioners could insist on unbridled constitutional freedoms and the right to retain their power as representatives of the people, their positions of trust would be one of right. The holding of a position of public trust is a privilege and not an absolute right. *Canteline* v. *McClellan, Commr. of Police,* 12 N. Y. S. 468, 25 N. E. (2d) 972; *French* v. *Senate,* 146 Cal. 604, 80 Pac. 1031; *Hamilton* v. *University of California,* 293 U. S. 245, 79 L. ed. 343; *West Virginia Board of Edu.* v. *Barnett,* 319 U. S. 624, 87 L. ed. 1628; *Cohen* v. *Wright,* 22 Cal. 293; *Ludolph* v. *Board of Police Commrs.,* 30 Cal. App. (2d) 211, 86 P. (2d) 118; *State* v. *Kirby,* 349 Mo. 988, 163 S.W. (2d) 990.

B. Constitutional Exercise of Police Power.

Assuming no implied covenant to abstain from overthrowing the government by force or violence, and to give information on this subject, and further assuming that the constitutional guarantees of freedom of speech and due process under the First and Fourteenth Amendments apply to petitioners, their constitutional

rights have not been violated because the oath and affidavit program is a proper exercise of the police power.

1. The constitutional guarantee of freedom of speech assured against Federal law in the First Amendment and against State action in the Fourteenth Amendment is not absolute.

> "That the freedom of speech which is secured by the Constitution does not confer an absolute right to speak, without responsibility, whatever one may choose, or an unrestricted and unbridled license giving immunity for every possible use of language and preventing the punishment of those who abuse this freedom; and that a state in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, . . . or endanger the foundations of organized government and threaten its overthrow by unlawful means, is not open to question." *Whitney* v. *California*, 274 U. S. 357, 71 L. ed. 1095, at 1104.
>
> "Liberty of speech and of the press is also not an absolute right and the state may punish its abuse." *Near* v. *Minnesota*, 283 U. S. 697, 75 L. ed. 1357, at 1363. (See also *Frohwerk* v. *United States*, 249 U. S. 204, 63 L. ed. 561; *Schenck* v. *United States*, 249 U. S. 47, 63 L. ed. 470).
>
> "The right (freedom of speech) is not an absolute one, and the state in the exercise of its police power may punish the abuse of this freedom." *Stromberg* v. *California*, 283 U. S. 359, 75 L. ed. 1117, at 1123.

"It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language, and prevents the punishment of those who abuse this freedom." *Gitlow* v. *New York*, 268 U. S. 652, 69 L. ed. 1138, at 1145-1146.

(Please also see *DeJonge* v. *Oregon*, 299 U. S. 353, 81 L. ed. 278; *Herndon* v. *Lowry*, 301 U. S. 242, 81 L. ed. 1066; *Cantwell* v. *Connecticut*, 310 U. S. 296, 84 L. ed. 1213; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 86 L. ed. 1031; *Terminiello* v. *Chicago*, 337 U. S. 1 (preliminary print) 93 L. ed. (Advanced Opinions) (No. 15) 865.

2. The State may, in the exercise of its police power, prevent its destruction so long as (a) the state action bears appropriate relation to the safety of the state; (b) it is not vague and indefinite; (c) the clear and present danger rule is satisfied.

a. The state action bears appropriate relation to the safety of the state.

The only action taken by the state is an inquiry. The inquiry is not coupled with any requirement of obedience. It is obvious that inquiry on behalf of the people for the limited purpose of finding if their representatives advocate the violent overthrow of the govern-

ment they are hired to represent is related to the safety of the state.

This inquiry bears relation to the fundamental rights of the people to be assured that their representatives are not breaching their trust. It bears relation to the American doctrine of government by will of the people. It bears relation to the preservation of the form of government lawfully chosen by the people.

The guarantee of freedom of speech does not deprive a state of the primary and essential right to self-preservation. *Gitlow* v. *New York*, 268 U. S. 652, 69 L. ed. 1138.

> "The Constitution was adopted to preserve our government, not to serve as a protecting screen for those who, while claiming its privileges, seek to destroy it." *United States ex rel M. S. D. Pub. Co.* v. *Burleson*, 255 U. S. 407, 414, 65 L. ed. 704, 710.
>
> "The security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government." *Near* v. *Minnesota*, 283 U. S. 697, 75 L. ed. 1357, at 1367.
>
> "The right (freedom of speech) is not an absolute one, and the state in the exercise of its police power may punish the abuse of this freedom. There is no question but that the state may thus provide for the punishment of those who indulge in utterances which incite to violence and crime and threaten the overthrow of organized government by unlawful means. There is no constitutional immunity for such conduct abhorrent to our in-

stitutions. *Gitlow* v. *New York*, and *Whitney* v. *California, supra.* We have no reason to doubt the validity of the second and third clauses of the statute as construed by the state court to relate to such incitements to violence." *Stromberg* v. *California*, 283 U. S. 359, 75 L. ed. 1117, at 1123.

"The essential rights of the First Amendment in some instances are subject to the elemental need for order without which the guarantees of civil rights to others would be a mockery." *United Public Workers* v. *Mitchell*, 330 U. S. 75, 91 L. ed. 754, at 770.

"We have said that Congress may regulate the political conduct of Government employees 'within reasonable limits,' even though the regulation trenches to some extent upon unfettered political action. The determination of the extent to which political activities of governmental employees shall be regulated lies primarily with Congress. Courts will interfere only when such regulation passes beyond the general existing conception of governmental power. That conception develops from practice, history, and changing educational, social and economic conditions. The regulation of such activities as Poole carried on has the approval of long practice by the Commission, court decisions upon similar problems and a large body of informed public opinion. Congress and the administrative agencies have authority over the discipline and efficiency of the public service." *United Public Workers* v. *Mitchell*, 330 U. S. 75, 91 L. ed. 754, at 774.

The freedom asserted by the petitioners, who are holders of positions of public trust, that their right to freedom of speech (right to remain silent) has been abridged brings them into collision with the most basic and powerful rights of private citizens to have a say in their government and know that that government is abiding by their will.

> "It is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin." *West Virginia State Bd. of Edu. v. Barnett*, 319 U. S. 624, 87 L. ed. 1628, at 1633.

b. The oath and affidavit adopted by the Board of Supervisors by order of August 26, 1947, is not vague and indefinite.

The oath and affidavit does not violate the due-process clause of the Fourteenth Amendment because it is vague, indefinite, uncertain, and fails to set forth ascertainable standards as to what is prescribed.

Petitioners contend that the County of Los Angeles and the State of California have not expressed a policy, as what looks like an oath and affidavit is not an oath and affidavit because it is so vague as to be meaningless. Petitioners contend that the due-process clause of the Fourteenth Amendment is thereby violated, and therefore the oath and affidavit must fail because of its conflict with the Constitution. The due-process clause of the Fourteenth Amendment of the Constitution provides:

" . . . ; nor shall any state *deprive* any person of life, liberty, or property, without due process of law. . . . " (Italics ours).

(1) Theory of denial of due process because of vague and indefinite standards applies only where there is an exaction of obedience.

It would appear that there can be no *deprivation* of due-process by application of the doctrine that the oath and affidavit is vague and indefinite unless the oath and affidavit is coupled with an exaction of obedience. If, as in this litigation, there is no exacting of obedience there can be no denial of due-process.

At the outset it must be remembered that nothing is prescribed.

There is *no penal statute* similar to that held a denial of due process as being vague and indefinite in *Thornhill* v. *Alabama,* 310 U. S. 88, 84 L. ed. 1093.

There is *no enjoining of publications* similar to that held a denial of due process as being vague and indefinite in *Near* v. *Minnesota,* 283 U. S. 697, 75 L. ed. 1357.

There is *no licensing system* similar to that held a denial of due process as being vague and indefinite in *Schneider* v. *Irvington,* 308 U. S. 147, 84 L. ed. 155, and *Lovell* v. *Griffin,* 303 U. S. 444, 82 L. ed. 949.

Cases holding penal statutes unconstitutional as violative of due-process clause in that they were vague and indefinite are not a proper guide in this case.

"The standard of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement." *Winters v. New York*, 333 U. S. 507, 92 L. ed. 840, at 849.

This rule was likewise made clear in the case of *Barsky v. United States*, 167 Fed. (2d) 241, wherein the Court said at page 247:

"The next phase of the problem is whether the power in inquiry was validly delegated by the Congress to the Committee.

"*It is said that the Resolution is too vague to be valid.* Perhaps the one phrase 'un-American propaganda activities,' taken alone as it appears in subclause (i) of the Resolution, would be subject to that condemnation. But the clause, above-quoted, 'subversive and un-American propaganda that . . . attacks the principle of the form of government as guaranteed by our Constitution,' which is subclause (ii), is definite enough. It conveys a clear meaning and that is all that is required. The principles which underlie the form of the existing government in this country are well-enough defined in basic documents preceding the Constitution, are obvious in the undebated unanimity which prevailed on many basic propositions in the Convention of 1787, were stated during the consideration of the adoption of the Constitution, are stated in countless scholarly works upon principles of government, and, indeed, are taught even to high school students in our schools. . . . Appellants argue that because the Resolution is

not on its face directly and exclusively concerned with such activities as may be constitutionally restricted, it is unconstitutional. Cases are cited to the point, but they are all criminal cases and dealt with the requirements in penal statutes. *There is a difference between the particularity required in the specification of a criminal act and that required in the authorization of an investigation, as a comparative examination of the cases cited by appellants and the cases dealing with investigations, above mentioned, readily shows.*" (Italics ours.)

As the Board order of August 26, 1947 is not a statute, as it contains no penalty, as it enjoins no publication, and as its does not constitute a licensing system, it would clearly appear that it does not fall within the doctrine established by the line of cases of which *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81, 65 L. ed. 516, is typical. All of these statutes were penal statutes. All of these statutes *exacted an obedience* to a rule or standard which was so vague and indefinite as really to be no rule or standard at all. There is no exaction of obedience that petitioners execute the oath and affidavit as there is no penalty under the Board of Supervisors' order of August 26, 1947, for failure of the petitioners to execute the oath and affidavit.

(2) Assuming there is a compulsion on petitioners to answer, the language of the oath and affidavit has a well-recognized meaning.

The Supreme Court of the United States has declared that phrases not as precise as "the advocacy of overthrow of the government by force or violence" are clear and have precise, definite meaning. Such a phrase is not " 'so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.' Connally v. General Constr. Co. 269 U. S. 385, 391, 70 L. ed. 322, 328. . . ." *Whitney* v. *California,* 274 U. S. 357, 71 L. ed. 1095, at 1102.

In Whitney v. *California,* supra, the section being challenged read, in part:

> "Section 1. The term 'criminal syndicalism' as used in this act is hereby defined as (to include) any doctrine or precept advocating . . . force and violence . . . as a means of accomplishing . . . any political change.
>
> "Sec. 2. Any person who: . . . (4) Organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism. . .
>
> "Is guilty of a felony and punishable by imprisonment." *Whitney* v. *California,* 274 U. S. 357, 71 L. ed. 1095 at 1099.

The Supreme Court declared, at p. 1102:

> "It is clear that the Syndicalism Act is not repugnant to the due process clause by reason of vagueness and uncertainty of definition. It has no substantial resemblance to the statutes held

void for uncertainty under the 14th and 5th Amendments in International Harvester Co. v. Kentucky, 234 U. S. 216, 221, 58 L. ed. 1284, 1287, 34 Sup. Ct. Rep. 853; and United States v. L. Cohen Grocery Co. 255 U. S. 81, 89, 65 L. ed. 516, 520, 14 A. L. R. 1045, 41 Sup. Ct. Rep. 298, because not fixing an ascertainable standard of guilt. The language of Sec. 2, subd. 4, of the act under which the plaintiff in error was convicted is clear; the definition of 'criminal syndicalism' specific.

"The act, plainly, meets the essential requirement of due process that a penal statute be 'sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties,' and be couched in terms that are not 'so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.'"

Obviously, if this court was of the opinion that criminal syndicalism has been adequately defined by such phrases as ". . . . advocating . . . force and violence . . . as a means of accomplishing . . . any political change", then these words in themselves have a sufficiently definite meaning. In the instant case the "advocacy of the force or violence" is not applied to *any* "political change" but *only* to the "specific overthrow of government" by force or violence.

In *Gitlow* v. *New York*, 268 U. S. 652, 69 L. ed. 1138, the Supreme Court of the United States had before it

Section 160 of the New York Penal Laws. Section 160 defined "criminal anarchy" to include:

> ". . . the doctrine that organized government should be overthrown by force or violence. . . ." 69 L. ed. at 1140.

The trial court charged the jury that a mere statement that unlawful acts might accomplish the overthrow of the government would be insufficient unless there was an advocacy of employing such unlawful acts for the purpose of overthrowing government. In discussing the challenging of the word "advocacy", this Court declared:

> "It does not restrain the advocacy of changes in the form of government by constitutional and lawful means. What it prohibits is language advocating the overthrow of organized government by unlawful means. These words imply urging to action. Advocacy is defined in the Century Dictionary as: '1. The act of pleading for, supporting, or recommending; active espousal.' It is not the abstract 'doctrine' of overthrowing organized government by unlawful means which is denounced by the statute, but the advocacy of action for the accomplishment of that purpose." 69 L. ed. 1145.

In these two cases, we have a clear declaration by the Supreme Court of the United States that the phrase "advocacy of the overthrow of government by force or violence" has a clear, precise, and well-recognized meaning.

(3) The interpretation of the Board order by the highest court of the State reviewing the matter should be given consideration.

Where the alleged vagueness of a statute has been cured by an opinion of the State court, the Supreme Court of the United States has affirmed a conviction under the stated limitation of meaning.

> "Where the alleged vagueness of a state statute has been cured by an opinion of the state court, confining a statute punishing the circulation of publications 'having a tendency to encourage or incite the commission of any crime' to 'encouraging an actual breach of law,' this Court affirmed a conviction under the stated limitation of meaning. The accused publication was read as advocating the commission of the crime of indecent exposure. *Fox* v. *Washington*, 236 U. S. 273, 277, 59 L. ed. 573, 575, 35 S. Ct. 383." *Winters* v. *New York*, 333 U. S. 507, 92 L. ed. 840, at 847.
>
> "What the statutes of a State mean, the extent to which any provision may be limited by other Acts or by other parts of the same Act, are questions on which the highest court of the State has the final word. The right to speak this word is one which State courts should jealously maintain and which we should scrupulously observe." *Musser* v. *Utah*, 333 U. S. 95, 98, 92 L. ed. 562, 565.

The State court's conclusion as to the scope of the Board order and oath and affidavit is binding upon the Supreme Court of the United States. *Kovacs* v. *Cooper*, 93 L. ed. (Advanced Opinions) 379, 385.

In this case we have an interpretation of the state court tying down the application of the order of the Board of Supervisors of August 26, 1947 to the determination of advocacy of overthrow of the government by force and violence. This state court decision is fortified by the fact that no employee who has executed the oath and affidavit has been in any way penalized or discriminated against because of such information, which clearly indicates the intent of the County elective officials to hold the application of the order to personal advocacy of overthrow of government by force or violence.

Here, the Board of Supervisors by action adopted an oath and affidavit. The oath and affidavit is narrowly drawn to cover the precise situation wherein information is sought, i.e.: the advocacy of the overthrow of the government by force or violence by one employed to represent that government. *Martin* v. *Struthers*, 319 U. S. 141, 87 L. ed. 1313. Advocacy of overthrow of government by force or violence has a clear and definite meaning. *Gitlow* v. *New York*, 268 U. S. 652, 69 L. ed. 1138; *Whitney* v. *California*, 274 U. S. 357, 71 L. ed. 1095; *Communist Party* v. *Peek*, 20 Cal. (2d) 536.

There is nothing indefinite about Paragraph "D" as the organizations referred to are actually specified by name. As pointed out by Mr. Justice Frankfurter in his dissent in the case of *Winters* v. *New York*, 333

U. S. 507, 92 L. ed. 840, at 859, the pinnacle of definiteness is designation by name:

> "But we are told that New York has not expressed a policy, that what looks like a law is not a law because it is so vague as to be meaningless. Suppose then that the New York legislature now wishes to meet the objection of the Court. What standard of definiteness does the Court furnish the New York legislature in finding indefiniteness in the present law? Should the New York legislature enumerate by name the publications which in its judgment are 'inciting violent and depraved crimes'?"

It must also be remembered that power of congress over the conduct of officers and employees of the government no more depends upon authority over the ultimate purposes of that conduct than the powers to punish a use of the mails for a fraudulent purpose is limited by its inability to punish the intended fraud. *United States* v. *Wurzbach*, 280 U. S. 396, 74 L. ed. 508.

c. The oath and affidavit meets the clear and present danger test, if that is applicable.

Respondents offer four answers to the claimed effect of the clear and present danger rule in this case:

(1) The clear and present danger rule applies to state *action*, not to state *inquiry*.

It is obvious that if the state is justified in limiting freedom of speech if there exists a clear and present danger, then as a corollary, the state has the power to

make an inquiry to see whether or not the clear and present danger exists.

"'. . . If the state were prevented from inquiry and compelled to wait until the apprehended danger became certain then its right to protect itself would come into being simultaneously with the overthrow of the government, when there would be neither prosecuting officers or courts for the enforcement of the law.'" *Gitlow v. New York*, 268 U. S. 652, 69 L. ed. 1138, at 1147 (quoting from *People v. Lloyd*, 304 Ill. 23, at 35 (136 N. E. 505).)

"This existing machinery of government has power to inquire into potential threats to itself, not alone for the selfish reason of self-protection, but for the basic reason that having been established by the people as an instrumentality for the protection of the rights of people, it has an obligation to its creators to preserve itself. Moreover, the process whereby a change in the form of government can be accomplished has been prescribed by the people in the same document which records the establishment of the presently existing machinery, and that process requires the Congress to initiate proposed amendments. We think that inquiry into threats to the existing form of government by extra-constitutional processes of change is a power of Congress under its prime obligation to protect for the people that machinery of which it is a part, and inquiry into the desirability *vel non* of other forms of government is a power of Congress under its mandate to initiate amendments if such become advisable. . . .

"The Congressional power of inquiry is not unrestricted. One obvious limitation upon this particular sort of inquiry is that some reasonable cause for concern must appear. We are referred to the 'clear and present danger' rule expressed by Mr. Justice Holmes in Schenck v. United States and extending through the line of cases cited and discussed in Bridges v. State of California. But all those cases dealt with statutes which actually imposed a restriction upon speech or publication. In our view, it would be sheer folly as a matter of governmental policy for an existing government to refrain from inquiry into potential threats to its existence or security until danger was clear and present. And for the judicial branch of government to hold the legislative branch to be without power to make such inquiry until the danger is clear and present, would be absurd. How, except upon inquiry, would the Congress know whether the danger is clear and present? There is a vast difference between the necessities for inquiry and the necessities for action." *Barsky* v. *United States*, 167 F. 2d 241, at 246.

(2) As holders of positions of public trust are possessed of a tremendous power over the private citizenry, then if the public servant advocates forceful overthrow of the government chosen by the people whom the public servant is hired to represent, an inherent clear and present danger exists.

The legislature has power to exclude from office those individuals and groups advocating the overthrow of the government by unlawful means.

"Such groups constitute an immediate threat to the functioning of our institutions. . . (Such groups) create a clear danger to the continued existence of the institutions under which our constitutional form of government functions." *Communist Party* v. *Peek*, 20 Cal. (2d) 536, at 551.

"It cannot be said that the state is acting arbitrarily or unreasonably when, in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration. It cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipiency. In People v. Lloyd, supra, (304 Ill. 23) p. 35 (136 N. E. 505) it was aptly said: 'Manifestly, the legislature has authority to forbid the advocacy of a doctrine designed and intended to overthrow the government without waiting until there is a present and imminent danger of the success of the plan advocated. If the state were compelled to wait until the apprehended danger became certain, then its right to protect itself would come into being simultaneously with the overthrow of the government, when there would be neither prosecuting officers nor courts for the enforcement of the law.'" *Gitlow* v. *New York*, 268 U. S. 652, 69 L. ed. 1138, at 1147.

Both the high court of California and this Court have recognized that certain dangers are inherently clear and present. The advocacy by a public servant of forceful and violent overthrow of the government he is hired to represent is certainly an inherent clear and present danger.

(3) Here the state has determined that advocacy of overthrow of the government by force or violence by holders of positions of public trust constitutes a clear and present danger of such substantive evil that it should be prevented by exercise of the police power.

> "By enacting the present statute the state has determined, through its legislative body, that utterances advocating the overthrow of organized government by force, violence, and unlawful means, are so inimical to the general welfare, and involve such danger of substantive evil, that they may be penalized in the exercise of its police power. That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute. *Mugler v. Kansas,* 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273; *Gitlow v. New York,* 268 U. S. 652, 69 L. ed. 1138, at 1146.
>
> "While the doctrine of the *Schenck* case has afforded practical guidance in a great variety of cases in which the scope of constitutional protection of freedom of expression was in issue (*Bridges v. State of California,* 314 U. S. 252, 63 S. Ct. 190, 193, 86 L. ed. 192), yet it is by no means of universal application. *Gitlow v. People of State*

of New York, 268 U. S. 652, 45 S. Ct. 625, 69 L. ed. 1138, definitely determines that the *Schenck* case doctrine is not applicable in situations where the legislative body has, by statute, determined that 'utterances of a certain kind involve such danger of substantive evil that they may be punished' 268 U. S. at page 670, 45 S. Ct. at page 631, 69 L. ed. 1138. *The distinction between such cases and those to which the Schenck case doctrine is applicable is clearly stated in the Gitlow opinion at pages 670 and 671 of 268 U. S., 45 S. Ct. at page 631, 69 L. ed. 1138.* This distinction has not been departed from nor weakened by any subsequent holding of the Supreme Court but, to the contrary, has been recognized and applied. *Cantwell v. State of Connecticut,* 310 U. S. 296, 307, 308, 60 S. Ct. 900, 84 L. ed. 1213, 128 A. L. R. 1352; *Herndon v. Lowry,* 301 U. S. 242, 256-258, 57 S. Ct. 732, 81 L. ed. 1066; *Stromberg v. People of State of California,* 283 U. S. 359, 368, 369, 51 S. Ct. 532, 75 L. ed. 1117, 73 A. L. R. 1484; *Whitney v. People of State of California,* 274 U. S. 357, 371, 372, 47 S. Ct. 641, 71 L. ed. 1095.

"The problem here is whether this Act falls within the rule of the *Gitlow* case. We think it is within the *Gitlow* case." *Dunne v. United States,* 138 F. 2d 137, at 145 (C. C. A. 8th 1943, certiorari denied 320 U. S. 790).

The legislative declaration of the Legislature of he State of California and the Board of Supervisors f the County of Los Angeles on this matter of major mport is entitled to great weight. *Whitney v. Cali-*

fornia, 274 U. S. 357, 71 L. ed. 1095 and *Gitlow v. New York,* 268 U. S. 652, 69 L. ed. 1138.

The oath and affidavit adopted by the Board of Supervisors comes before this court "encased in armor wrought by prior legislative deliberation." For here, the Legislature of California and the Board of Supervisors of the County of Los Angeles "appraised a particular kind of situation and found a specific danger sufficiently imminent to justify a restriction on a particular kind of utterance." *Bridges v. California,* 314 U. S. 252, 86 L. ed. 192, at 202. (Please also see *Cantwell v. Connecticut,* 310 U. S. 296, 84 L. ed. 1213, and *Herndon v. Lowry,* 301 U. S. 242, 81 L. ed. 1066.)

The oath and affidavit is "narrowly drawn to cover the precise situation that calls for remedial action." *Martin v. Struthers,* 319 U. S. 141, 87 L. ed. 1313, at 1321.

The Board of Supervisors of the County of Los Angeles by adopting the oath and affidavit have declared that advocacy of violent overthrow of the government by holders of positions of public trust involves such a danger to the public peace and the security of the State and the County that inquiry should be made to determine whether such advocacy by public employees of the County exists. *Whitney v. California,* 274 U. S. 357, 71 L. ed. 1095.

Therefore, it is not incumbent upon this court to find "as an original question" that such advocacy created "'such likelihood of bringing about the sub-

stantial evil as to deprive (them) of the constitutional protection.' *Gitlow v. New York,* 268 U. S. 652, 69 L. ed. 1138, 1148." *Bridges v. California,* 314 U. S. 252, 86 L. ed. 192, at 202.

The California Legislature and the Board of Supervisors of the County of Los Angeles are reasonably exercising the police power as "it is a question of proximity and degree." *Schenck v. United States,* 249 U. S. 47, 63 L. ed. 470, at 474.

(4) The "clear and present danger" relates to the evil of advocacy of violent overthrow of the government by an employee thereof, (as) and such advocacy is one of the substantive evils which the people have the right to prevent.

The test does not envisage only dangers which may imperil the security of government, although the facts involved in the principle of the oath and affidavit could meet even such a standard. The principle which was first stated by Mr. Justice Holmes in *Schenck v. United States,* 249 U. S. 47, 52, 63 L. ed. 470, 473, is that:

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils *that Congress has a right to prevent.*" (Italics ours.)

In the case of *Pennekamp v. Florida,* 328 U. S. 331, 335, 90 L. ed. 1295, 1297, the court made it clear that:

> "The danger to be guarded against is the 'substantive evil' sought to be prevented,"

and "substantive evil" in this context clearly did not refer merely to safety of the government.

In *West Va. Board of Edu. v. Barnett*, 319 U. S. 624, 639, 87 L. ed. 1628, 1638, the court stated that the freedoms granted by the First Amendment "are susceptible of restriction only to prevent grave and immediate danger *to interests which the state may lawfully protect.*" (Italics ours).

The Court has rejected the argument that the clear and present danger test prevents prohibiting the distribution of religious literature by Children (*Prince v. Commonwealth of Massachusetts*, 321 U. S. 158, 167, 88 L. ed. 645, 653), or penalizing the use of language likely to cause a public altercation (*Chaplinsky v. New Hampshire*, 315 U. S. 568, 86 L. ed. 1031). And the assumption underlying the *Bridges* and *Pennekamp* decisions is that expressions which would in fact constitute a serious danger to the fair administration of justice could be punished. Although these cases involved important substantive evils, none of them were concerned with anything menacing the security of government.

The substantive evil here is the danger of breach of public trust which must result if the holder of a position of public trust (representing the people in their lawfully selected form of government) advocates the destruction of that government by force and violence.

This evil the elective representatives of the people have a right to prevent. A further substantive evil is the danger of holders of positions of public trust failing to advise the people that they are breaching the trust. This evil may likewise unquestionably be prevented by the elective representatives of the people.

The cases suggest that the evils which justify a limitation upon First Amendment rights must be "substantial" or "serious", not "a minor matter of public inconvenience or annoyance," (*Bridges v. California*, 314 U. S. 252, 262, 263, 86 L. ed. 192) such as the littering of the streets with handbills (*Schneider v. Town of Irvington*, 308 U. S. 147, 84 L. ed. 155), but certainly the evil at which the oath and affidavit strikes is substantial and serious. Use of positions of public trust for the purpose of destroying the trust by force and violence and destroying the form og government which guarantees government by will of the people is an example of one of the most substantial and serious evils ever to be reviewed by this court.

C. Affirmative Constitutional Grant of Power.

There is an affirmative grant of power to the people in Article VI, Clause 3, of the United States Constitution to require oaths of holders of positions of public trust.

The framers of the Constitution of the United States and the first ten Amendments thereto, were well aware of the fact that government, as a body politic

and corporate, is a lifeless and powerless thing which has never in the history of mankind deprived people of any rights whatsoever. The deprivation of the rights of the private citizens comes about by and through the office holder. It was from the yoke of actions by tyrannical office holders that the framers of the Constitution and the first ten Amendments were attempting to forever extract themselves. The drafters of these documents well knew that the guarantees of the Bill of Rights in the hands of public officers and employees who would conduct themselves as masters and not as servants would be but dead words upon parchment.

The guarantee contained in the Bill of Rights of the right to a trial by jury (Seventh Amendment) is certainly mere writing upon parchment to the wife of a man who lies dead upon the street because of the action of a trigger-happy marshal who odvocated that the just punishment for all suspected felons was extensive use of his trusty .45. If this marshal can be discharged because he failed to comply with constitutional requirements, and if we in truth have a government subject to the will of the people who do not wish their constitutional rights to be thus abridged, then certainly these very same people can require assurance of this marshal before he has the opportunity to exercise the power of his office that he will not conduct himself in such a manner as to deprive the private citizenry of their constitutional rights.

We are at the crossroads of the problem which Abraham Lincoln cast in memorial dilemma:

> "Must a government of necessity be too strong for the liberties of its people, or too weak to maintain its existence?"

This court has declared that government is too strong if it limits free speech of its private citizens, absent clear and present danger. *West Virginia State Board of Education v. Barnett*, 319 U. S. 624, 87 L. ed. 1628.

However, is government too strong because it asks assurances from the agents of the people that they will not advocate the overthrow, by force or violence, of the government lawfully selected by the people? Obviously not. The constitutional framers were aware that a prevention of an infringement of free speech by law of Congress and action of state could not protect them from arbitrary abuse of public officers. The First Amendment protects the private citizens against *Federal laws*. The Fourteenth Amendment carries the protection of the First to *State action*. In neither the First Amendment nor the Fourteenth Amendment is a private citizen protected against action by *another individual*.

As the private citizen has no protection (through the operation of the First Amendment and the Fourteenth Amendment) against oppressive action by an office holder, not taken under color of governmental authority, then other safeguards for the people against

oppressive actions of office holders had to be written into the Constitution. (Reference: "New Threats to American Freedoms", page 25, Robert E. Cushman.)

The American form of government requires the government to be responsible to the will of the people. *Stromberg v. California,* 283 U. S. 359, 75 L. ed. 1117, and *Terminiello v. Chicago,* 337 U. S. 1 (Preliminary print) 93 L. ed. Advanced Opinions (No. 15) 865. We must "secure freedom from oppressive administration. . . ." *Thornhill v. Alabama,* 310 U. S. 88, 84 L. ed. 1093, at 1102:

> "Those who have gone before us have admonished us 'that in a free representative government nothing is more fundamental than the right of the people through their appointed servants to govern themselves in accordance with their own will.'" *Bridges v. California,* 314 U. S. 252, 86 L. ed. 192, at 213.

Therefore, the Constitution in order to completely round out the guarantee of freedom from an arbitrary and oppressive action by public officials, specifically granted affirmative power to the people to require from the holders of positions of public trust a solemn commitment that such officers and employees would not advocate the violent overthrow of the government lawfully chosen by the people. So that there would be no misapprehension on this subject, the Constitutional framers provided affirmative internal evidence of this right in the Constitution itself. In the Sixth Article of the Constitution, clause 3 thereof, they provided:

"The senators and representatives before mentioned, and the members of the several state legislatures and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States."

So great at times has been the emphasis on purely negative characteristics of the Constitution, on prohibitions of the exercise of power rather than on the giving of power, as to create the false impression that the primary function of the Constitution is negative rather than positive. Important as are the negative functions, their exercise would have no point were there no positive functions on which to exercise restraint. (Reference: "The Growth of Constitutional Power in the United States," page 23, by Carl Brent Swisher.) By granting affirmative power in the people to require, from both federal and state officers, an oath to support the Constitution, the people are given a direct authority over their representatives and a solemn guarantee of their liberty. The office holders must solemnly pledge that by supporting the Constitution they will not advocate the overthrow of the government by force or violence because in supporting the Constitution they must pledge and agree that there is only one manner of bringing about a change, which single method is provided in the Constitution.

The constitutional framers in requiring oaths from public officers did not specify the language of the oath but established the pattern for the minimum oath and the maximum oath. Article VI establishes the minimum requirement that the holders of positions of public trust must be bound to support the Constitution. It then declares that the maximum requirement may not include a religious test. Between the mandatory minimum requirement that the Federal and State officers execute an oath to support the Constitution and the maximum requirement that such oath may not require a religious test, lies the field of discretion of the people to obtain detailed assurance from their representatives that they give proof that they will support the Constitution.

Government by will of the people and not by oppressive office holders is made possible by three main Constitutional provisions:

First, the First Amendment *prevents Congress from passing any law* depriving the private citizenry of any rights therein specified.

Second, the Fourteenth Amendment makes the guarantee of the First Amendment secure from *state* action.

Third, the Sixth Article *grants affirmative power in the people to require oaths from federal and state office holders* pledging their support of the Constitution, which a fortori includes agreement to abide by the form of change established in the Constitution and further agreement that the

office holders will not advocate change by force or violence.

Petitioners cannot contend that their right to remain silent is violated by being asked to execute an oath and affidavit. This requirement stems from Article VI, Clause 3, of the United States Constitution. As the First Amendment prevents abridgment by law of Congress and the Fourteenth Amendment prevents abridgment by State action, obviously neither refer to the United States Constitutional requirement in Article VI, Clause 3. Article VI, Clause 3, of the United States Constitution is neither a law of Congress nor State action.

VII.

REITERATION OF PRIOR CONTENTIONS IN BRIEF IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI.

Respondents reiterate the contentions made in their Brief in Opposition to Petiton for Writs of Certiorari. Respondents contend that this court should not have taken jurisdiction on certiorari as the decision of the State court is supported by adequate state grounds.

Petitioners are before this court seeking a review of their rights arising under an employment contract and not a review of their constitutional rights as private citizens. It is clear that petitioners' rights stem from a contractual status. These rights have been de-

clared by the state court and no federal question in relation to the First and Fourteenth Amendments is in issue.

Petitioners are asking this court to determine that they cannot be penalized for information given in the oath and affidavit. The Los Angeles County Charter provides a specific administrative remedy to review penalties of County employees*, and petitioners have not exhausted these administrative remedies. The issue of penalty for refusal to execute the oath and affidavit is not present in this litigation.

Furthermore, the state court found that the issue of penalty was premature, as none existed in the Board of Supervisors' order of August 26, 1947. The state court also found that even though it be assumed that the committee respondents were threatening the petitioners, as alleged in paragraphs VII through X of petitioners' amended complaints (P. 5, 6, 7; S. 4, 5, 6), that said respondents had no legal power to carry out said threats. (P. 58, 59; S. 47).

It will be noted that only the committee respondents are alleged to have made the threats. No threats are attributed to the Board of Supervisors or the department heads as the appointing power.

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*Los Angeles County Charter Sec. 34, subdiv. 13.

VIII.

NO JUSTICIABLE CASE OR CONTROVERSY IS PRESENTED

The following is urged in supplement to the points raised in Respondents' Brief in Opposition to Petition for Writs of Certiorari.

Summary

A determination of the constitutional issues raised by the petitioners in this case is without the well-defined boundaries of judicial authority. In observance of the doctrine of separation of power between the lawmaking branches of government and the judiciary, this Court has repeatedly held that the mere naked enactment of a statute without effort to enforce it presents no judicial case or controversy. If the Board of Supervisors' order pleaded provides for no penalty for failure to comply, then there can be no enforcement. Any assumption that further orders will be made by the Board of Supervisors and the nature of the penalty presumed in such orders are all hypothetical factors not present in this litigation.

When the surplusage in petitioners' amended complaint is disregarded, the pleadings allege that:

1. The Board of Supervisors did on August 26, 1947, adopt an oath and affidavit, as set forth in Exhibit "A" to petitioners' amended complaints (P. 16; S. 15).

2. Petitioners are County employees and within the scope of said Board order. (P. 2; S. 1).

The Board of Supervisors did adopt a policy of inquiry and an oath and affidavit to be submitted to petitioners. Petitioners are objecting that they must elect either to sign or not to sign; that the mere submission of the oath and affidavit to them constitutes a violation of their constitutional rights, although if they refuse to sign or do sign no penalty is prescribed.

These are the sole and exclusive facts before this Court. The allegations embraced in paragraphs VII to X, inclusive, of the amended complaints, are figments of the imagination and constitute solely and entirely the conjecture, surmise and apprehension of petitioners. Respondents submit that the amended complaints, under fundamental rules of law, demonstrate the fictitious nature of the threats made, and as a result, paragraphs VII to X, inclusive, are to be ignored. This leaves only the status of petitioners and the naked adoption of the Board's order of August 26, 1947, unimplemented by any action in furtherance thereof. To exercise judicial power on such a record is to exercise a legislative veto.

Argument

Jurisdiction of this Honorable Court is defined by Article III of the Constitution of the United States which limits the Court to the exercise of judicial power only in connection with a case or controversy.

A. What Is "Case or Controversy"?

By the terms "cases" and "controversies" used in the judicial article of the Constitution defining the limits of the judicial power of the United States "are intended the claims or contentions of litigants brought before the courts for adjudication by regular proceedings established for the protection or enforcement of rights or the prevention, redress, or punishment of wrongs. Whenever the claim or contention of a party takes such a form that the judicial power is capable of acting upon it, then it has become a case or controversy." (*Smith v. Adams,* 130 U. S. 167, 173, 32 L. Ed. 895, 897.)

In harmony with this rule the Court has stated on other occasions that "there be an actual controversy arising between adverse litigants" (*Muskrat v. United States,* 219 U. S. 346, 361, 55 L. Ed. 246, 252); an "actual controversy, involving real and substantial rights, between the parties to the record," (*Little v. Bowers,* 134 U. S. 547, 557, 33 L. Ed. 1016, 1020); calling for a determination of "rights of persons or of property, which are actually controverted in the par-

ticular case" (*California v. San Pablo & T. R. Co.*, 149 U. S. 308, 314, 37 L. Ed. 747, 749); a "real, earnest and vital controversy between individuals" (*Chicago & Grand Trunk Ry. Co. v. Wellman*, 143 U. S. 339, 345, 36 L. Ed. 176, 179); "an actual controversy and adverse interests" (*Lord v. Veazie*, 8 How. 251, 255, 12 L. Ed. 1067, 1069); "the essentials of an adversary proceeding, involving a real, not a hypothetical, controversy" (*Nashville, C. & St. L. Ry. Co. v. Wallace*, 288 U. S. 249, 264, 77 L. Ed. 730, 736).

Conversely, this Court has held that its judicial power does not extend to determination of abstract questions, hypothetical cases or questions, the rendition of advisory opinions or the consideration of ill-defined controversies over constitutional issues. (*Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 324, 80 L. ed. 688, 699; *United Public Workers v. Mitchell*, 330 U. S. 75, 88, 91 L. ed. 754, 766.)

In the *United Public Workers* case, *supra*, the Court specifically stated that the requirements of a case or controversy applied with equal force to declaratory judgments.

B. Rule When Federal Statute Involved.

Where claim is made that acts of Congress are unconstitutional, this Court has always made full inquiry to assure itself that a case or controversy exists.

In the case of *Massachusetts v. Mellon*, 262 U. S. 447, 488, 67 L. Ed. 1078, 1085, the Court said at page 412:

"The functions of government under our system are apportioned. To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts. The general rule is that neither department may invade the province of the other and neither may control, direct or restrain the action of the other. . . . We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the jurisdiction for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right. The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. If a case for preventive relief be presented the court enjoins, in effect, not the execution of the statute, but the

acts of the official, the statute notwithstanding. Here the parties plaintiff have no such case. Looking through forms of words to the substance of their complaint, it is merely that officials of the executive department of the government are executing and will execute an act of Congress asserted to be unconstitutional; and this we are asked to prevent. To do so would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess."

More recently, in the case of *United Public Workers v. Mitchell*, 330 U. S. 75, 90, 91 L. Ed. 754, 767, this Court said:

"The Constitution allots the nation's judicial power to the federal courts. Unless these courts respect the limits of that unique authority, they intrude upon powers vested in the legislative or executive branches. Judicial adherence to the doctrine of the separation of powers preserves the courts for the decision of issues, between litigants, capable of effective determination. Judicial exposition upon political proposals is permissible only when necessary to decide definite issues between litigants. When the courts act continually within these constitutionally imposed boundaries of their power, their ability to perform their function as a balance for the people's protection against abuse of power by other branches of government remains unimpaired. Should the courts seek to expand their power so as to bring under their jurisdiction

ill-defined controversies over constitutional issues, they become the organ of political theories. Such abuse of judicial power would properly meet rebuke and restriction from other branches. By these mutual checks and balances by and between the branches of government, democracy undertakes to preserve the liberties of the people from excessive concentrations of authority."

C. Rule When State Statute Involved

The rule is no different when the alleged conflict is between a state statute and a provision of the Federal Constitutional.

Thus, in the case of *Chicago and G. T. R. Co. v. Wellman*, 143 U. S. 339, 345, 36 L. Ed. 176, 179, the Court said:

> "The theory upon which, apparently, this suit was brought is that parties have an appeal from the Legislature to the courts; and that the latter are given an immediate and general supervision of the constitutionality of the acts of the former. Such is not true. Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any Act of any Legislature, state or federal, and the decision necessarily rests on the competency of the Legislature to so enact, the court must, in the exercise of its solemn duties, determine whether the Act be constitutional or not; but such an exercise of power is the ultimate and supreme function of

courts. It is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the Legislature could transfer to the courts an inquiry as to the constitutionality of the legislative Act."

Because the jurisdiction of the federal judiciary is limited to actual cases and controversies and does not include the power to hear and decide mere differences of opinion and render advisory opinions upon hypothetical facts, the court has been ever alert to detect the presence of such feigned controversies.

D. Feigned Controversies Are Not Justiciable.

In *Little v. Bowers*, 134 U. S. 547, 558, 33 L. Ed. 1016, 1021, the Court said:

"The fact that there is no controversy between parties to the record, ought, in the interest of pure administration of justice, to be allowed to be shown at any time before the decision of the case. Any other rule would put it in the power of designing persons to bring up a feigned issue in order to obtain a decision of this court upon a question involving the rights of others who have had no opportunity to be heard."

A stronger statement of the rule is found in *Lord v. Veazie*, 8 How. 251, 255, 12 L. Ed. 1067, 1069, where the Court said:

"And any attempt, by a mere colorable dispute, to obtain the opinion of the court upon a question of law which a party desires to know for his own interest or his own purposes, when there is no real and substantial controversy between those who appear as adverse parties to the suit, is an abuse which courts of justice have always reprehended, and treated as a punishable contempt of court."

Existence of Board of Supervisors' order without compulsion on petitioners to comply presents no controversy. In accordance with the Court's duty and responsibility to exercise judicial power only, it is established by numerous decisions of this Court that the bare existence of a statute which might affect an individual in the absence of any actual, as distinguished from potential, act to apply or enforce the statute, presents no justiciable case or controversy.

In *Cherokee Nation v. Georgia*, 5 Pet. 1, 75, 8. L. Ed. 25, 52, this Court said:

"This court can have no right to pronounce an abstract opinion upon the constitutionality of a state law. Such law must be brought into actual or threatened operation, upon rights properly falling under judicial cognizance, or a remedy is not to be had here."

In *Massachusetts v. Mellon*, 262 U. S. 447, 483, 67 Ed. 1078, 1083, the Court said:

"In the last analysis, the complaint of the plaintiff state is brought to the naked contention

that Congress has usurped the reserved powers of the several states by the mere enactment of the statute though nothing has been done and nothing is to be done without their consent; and it is plain that that question as it is thus presented, is political, and not judicial, in character, and therefore is not a matter which admits of the exercise of the judicial power."

In *New Jersey v. Sargent*, 269 U. S. 328, 339, 70 L. Ed. 289, 294, the Court states:

"While the state is thus apparently put in the position of objecting to the licensing of projects sanctioned by its own laws, the bill explains that the objection is chiefly to the restrictions and conditions to which, according to the terms of the act, an applicant is deemed to assent by seeking and accepting a license. These restrictions and conditions are assailed in the bill as passing beyond the field of congressional power and invading that reserved to the state. But whether they are thus invalid cannot be made the subject of judicial inquiry until they are given or are about to be given some practical application and effect."

In the case of *United States v. West Virginia*, 295 U. S. 463, 474, 79 L. Ed. 1546, 1552, the Supreme Court stated:

". . . Until the right asserted is threatened with invasion by acts of the State, which served both to define the controversy and to establish its existence in the judicial sense, there is no question presented which is justiciable by a federal court."

The Court further stated in the case of *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 324, 80 L. Ed. 688, 699:

> " . . . The pronouncements, policies and program of the Tennessee Valley Authority and its directors, their motives and desires, did not give rise to a justiciable controversy save as they had fruition in action of a definite and concrete character constituting an actual or threatened interference with the rights of the persons complaining. The judicial power does not extend to the determination of abstract questions.
>
> ". . . Claims based merely upon 'assumed potential invasions' of rights are not enough to warrant judicial intervention."

In the case of *Watson v. Buck*, 313 U. S. 387, 400; 85 L. Ed. 1416, it is said:

> "A general statement that an officer stands ready to perform his duty falls far short of such a threat as would warrant the intervention of equity."

The rule finds its most recent affirmance in the case of *United Public Workers v. Mitchell*, 330 U. S. 75; 91 L. Ed. 754, where the validity of the Hatch Act was questioned by Federal employees. Only one party, Poole, had admittedly violated the act and had been advised by the Civil Service Commission that he was to be discharged. The other petitioners had "a desire to act contrary to the rule against political activity",

but no admission was made that the Hatch Act had been violated.

The following excerpts from the court's opinion were directed specifically to this latter class of petitioners:

> "The affidavits, it will be noticed, follow the generality of purpose expressed by the complaint." 330 U. S. 75, 88; 91 L. Ed. 754, 766.
>
> "The threats which menace the affiants of these affidavits in the cases now being considered are closer to a general threat by officials to enforce those laws which they are charged to administer, . . . than they are to the direct threat of punishment against a named organization for a completed act . . .". 330 U. S. 75, 88; 91 L. Ed. 754, 766.
>
> "The power of courts and ultimately of this court, to pass upon the constitutionality of acts of Congress arises only when the interests of litigants require the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough." 330 U. S. 75, 89; 91 L. Ed. 754, 767.
>
> "No threat of interference by the Commission with rights of these appellants appears beyond that implied by the existence of the law and regulation." 330 U. S. 75, 91; 91 L. Ed. 754, 768.

The court then states:

> "We should not take judicial cognizance of the situation presented on the part of the appellants

considered in this subdivision of the opinion." 330 U. S. 75, 91; 91 L. Ed. 754, 768.

This is a clear determination by this court that something more than the mere enactment of a statute is needed to create a judicial case or controversy.

The rule of these cases is also affirmed in the case of *Continental Baking Company v. Woodring,* 286 U. S. 352, 367; 76 L. Ed. 1155, 1164, and in the case of *Great Atlantic & Pacific Tea Co. v. Grosjean,* 301 U. S. 412, 429; 81 L. Ed. 1193, 1203. The language of the foregoing cases is tersely and concisely summarized by this court when it stated in *Lehon v. Atlanta,* 242 U. S. 53, 56; 61 L. Ed. 145, 150.

> "To complain of a ruling, one must be made the victim of it. One cannot invoke, to defeat a law, an apprehension of what might be done under it, and which, if done, might not receive judicial approval."

The rule of these cases applies to suit for injunction. *United Public Workers v. Mitchell,* 330 U. S. 75, 91 L. Ed. 754; *Watson v. Buck,* 313 U. S. 387, 85 L. Ed. 1416; *Ashwander v. Tennessee Valley Authority,* 297 U. S. 288; 80 L. Ed. 688.

Under the authority of the foregoing cases, the rule is clearly and positively established that mere passage of a law which might affect an individual confers no right upon such person to contest the validity of the statute.

E. Pleading in Generalities Does Not Present the Necessary Issues of a Controversy.

Petitioners attempt to obviate the rule by the technique of alleging a series of very vague and completely general allegations embraced in the form of subjective conclusions that threats have been made against them by county officials acting in furtherance of the Board of Supervisors' order of August 26, 1947. An illustration of the type of allegations in question is found in paragraph VII of the petitioners' amended complaints, wherein it is alleged:

> "Defendant members of the Committee are now engaged in the coordination, supervision and effectuation of the 'Loyalty Check' and have threatened and do now threaten, and will, unless restrained by this Court, cause plaintiffs and all employees similarly situated to be discharged or otherwise penalized in their employment unless they execute the oath and affidavit prescribed and required by paragraph numbered 5 of said 'Loyalty Check.'" (P. 5, S. 4).

The United States Supreme Court and the courts of California have never accepted such casual claims of threats and have been alert to similar efforts to conceal an absence of essential facts behind a wall of self-serving assumptions.

Thus in *Boise-Artesian Hot and Cold Water Company v. Boise City*, 213 U. S. 276, 285; 53 L. Ed. 796, 800, this court said:

"It is true that the bill contains a vague allegation that the City has threatened to remove the company's pipe and works from the City, but no facts whatsoever are alleged showing such a threat."

In the case of *Isbrandtsen-Miller Co. v. United States,* 300 U. S. 139; 81 L. Ed. 562, plaintiff was ordered to make a report of the nature and extent of its transportation business to the Secretary of Commerce. One cause of action for injunction alleged that the order of the Secretary of Commerce was prompted by the ulterior motive of forcing plaintiff to join a conference or shipping monopoly or else suffer damage by disclosure of its business records. The court said on page 145 of U. S.:

"Aside from the principle that if the order is justified by lawful purpose, it is not rendered illegal by some other motive in the mind of the officer issuing it, the allegations of the complaint are mere conclusions, unsupported by any facts pleaded and are, therefore, insufficient."

In *United Public Workers v. Mitchell,* 330 U. S. 75, 91 L. Ed. 754 an examination of the record clearly reveals that the court did not accept the imaginative assertions of petitioners that they had been threatened and held that the alleged threats meant nothing more than what might be implied by the existence of the regulations. This finding was made by the court even in the face of an amendment to petitioners' complaint,

which set forth that the respondents had publicized in Civil Service Form 1982 the fact that they would cause the removal of any employee who violated the Hatch Act.

In the case of *Ellis Landing & Dock Co. v. Richmond*, 70 Cal. App. 720 (234 Pac. 336) the California court said:

> "This action is one brought by plaintiff as a taxpayer of the City of Richmond for the purpose of enjoining said city from proceeding, carrying out, and operating under a lease that is void because of its execution in excess of the powers of the city and in a manner other than provided by the charter. The court sustained a demurrer to the complaint without leave to amend."

At page 723 of Cal. App., the Court stated:

> The mere conclusion of the pleader in the complaint that the defendants, and their officers, employees, and agents, and each of them, long after the abandonment of the agreement, come out and threatened to proceed to act under and in pursuance to the terms of the attempted agreement without the recital of any facts showing such intention, can add nothing to the complaint . . . It is not the policy of the law to allow a writ of injunction to be invoked upon the mere declaration of a pleader that public officials are about to violate their duty without the recital of some facts justifying such conclusions."

In *McKay v. Retail Auto S. L. Union No. 1067*, 16 Cal. (2d) 311, 320; 106 Pac. 2d 373, 378, the court said:

". . . True, the plaintiffs use the words 'compel' and 'coerce' in connection with the activities of the defendants, but by these words, in the light of the only specific activities alleged, the pleader does no more than to charge that the compulsion or coercion, though peaceful, was unlawful, which, of course, is only a conclusion.

"It is a fundamental principle that the drastic sanctions of equity may not be invoked without a detailed showing of specific facts justifying such relief."

In *Davitt v. American Bakers' Union*, 124 Cal. 99, 101; 56 Pac. 775, the court said:

". . . In the face of the demurrer interposed in this case the complaint must fall. Possibly, the complaint is not sufficient to stand, even against a general demurrer, but, however that may be, it surely is too weak to stand an attack made upon it by a special demurrer. This complaint deals in generalities throughout, and the rule for drafting a pleading which asks for the interposition of equitable relief demands a statement of the specific facts upon which relief is sought. Inference, generalities, presumptions, and conclusions have no place in such a pleading."

In the case of *Renzel Co. v. Warehouseman's Union*, 16 Cal. (2d) 369, 373; 106 Pac. 2d 1, 3, the court said:

> "Facts concerning the irreparable injury which it is asserted, will result to the complainant unless protection is extended to him, must be pleaded in order that the Court may consider whether his apprehensions are well founded."

The foregoing cases clearly hold that petitioners' general allegations of "threats" without the recital of any facts which will enable this court to determine whether their conclusions are well-founded presents no justiciable issue for consideration. Under established rules of pleading, Respondents respectfully submit that the allegations in paragraphs VII through X of petitioners' amended complaints are surplusage and not considered on general demurrer. As this court said in the case of *Pierce Oil Co. v. City of Hope*, 248 U. S. 498, 500; 63 L. Ed. 381, 383:

> "The averment that the ordinance is unnecessary and unreasonable, if it be regarded as a conclusion of law upon the point which this court must decide, is not admitted by the demurrer. If it be taken to allege that facts exist that lead to that conclusion it stands no better. . . . . Only facts well-pleaded are confessed."

The same rule is affirmed in *Equitable Life Insurance Society v. Brown*, 213 U. S. 25, 53 L. Ed. 682.

Ignoring the allegations of paragraph VII through X of petitioners' amended complaints on the grounds that they are conclusions, only two facts are submitted to this Court:

(1) The status of petitioners as county employees, and

(2) The adoption of the oath and affidavit by the Board of Supervisors on August 26, 1947.

These two facts raise no issue beyond the political expediency of respondents' order.

Petitioners address an argument to this court which assumes that threats of a direct, specific and concrete nature have been made and will continue to be made against petitioners by respondents. Based upon such an assumpton, petitioners state that their complaints present a judicial case or controversy. This assertion would be persuasive if "threats" were established, but the entire argument falls because threats of the type which would establish a case or controversy have not been made and as a natural consequence not presented to the Court. To repeat the language of this court, "It is true that the bill contains a vague allegation that the city has threatened to remove the company's pipes and works from the city, but no facts whatsoever are alleged showing such a threat." *Boise-Artesian Hot and Cold Water Co. v. Boise City*, 213 U. S. 276, 285; 53 L. Ed. 796, 800. This language finds precise application to Paragraphs VII through X of petitioners' amended complaints.

F. Petitioners' Cases.

Because petitioners have assumed the existence of the very matter at issue, the cases cited by them have no application to the problem before the court. None of the cited cases change the boundaries of judicial authority to include what was termed in the case of *Chicago G. T. R. Co. v. Wellman*, 143 U. S. 339, 345, 36 L. ed. 176, 179, "an appeal from the Legislature to the Courts" with the latter "given an immediate and general supervision of the constitutionality of the former." Petitioners admit that "generalized desires against the naked unimplemented statutory provision" is insufficient to present a case or controversy. (See Petitioners' Special Reply Memorandum, page 12.)

In the case of *Aetna Life Insurance Company v. Haworth*, 300 U. S. 227, 81 L. ed. 617 (Petitioners' Special Reply Memorandum, page 7), the defendant claimed a total disability and hence the right to receive from plaintiff the proceeds of certain insurance policies. While the defendant had filed a claim with the plaintiff for payment, and had been advised that the same was rejected, the insured had not filed suit to recover the claimed benefits. Plaintiff insurance company brought suit for declaratory relief because they were fearful that the witnesses necessary to prove the relative rights and liabilities of the party might die or disappear before the insured elected to file suit. There could be no doubt but that the insured could have brought an action. In the case of *Maryland Casualty*

Company v. Pacific Coal and Oil Company, 312 U. S. 270, 85 L. ed. 826, (Petitioners' Special Reply Memorandum, page 7), the court in speaking of the *Aetna Life Insurance* case stated:

> "It is immaterial that frequently, in a declaratory judgment suit, the positions of the parties in a conventional suit are reversed: . . . "

In the case of *Maryland Casualty Company, supra*, also cited by petitioners in their Special Reply Memorandum, petitioner insured the Coal and Oil Company and agreed to indemnify them for injuries to third parties caused by automobiles hired by the insured. An automobile driven by an employee of the insured injured a party by the name of Orteca. Orteca sued the insured in a State court, and it further appears that under the State law, if Orteca recovered judgment against the insured, he could proceed to enforce payment by supplemental proceedings against the insurance carrier. The insurance carrier claimed that the automobile which caused the injury was not one hired by the insurance carrier. The insurance carrier filed its declaratory relief action in Federal Court for the purpose of bringing together all the parties before one court for a complete determination of rights. The suit was neither abstract nor hypothetical as all facts from which the actual rights and liabilities of the parties could attach had occurred at the time suit was filed. The only determinations to be made were the legal consequences flowing from the facts well pleaded.

In the case of *Perkins v. Elg*, 99 Fed. (2d) 408 (Petitioners' Special Reply Memorandum 10); defendant was required by law to deport aliens illegally in the United States. In accordance with the law, plaintiff was ordered to leave the country and threatened with deportation if she did not. In the *Perkins* case the threat of action against plaintiff was real, attested by the existence of specific facts, dehors the opinions, conclusions, conjectures and apprehensions of the petitioner. The same cannot be said in the instant case.

The instant case and the case of *United Public Workers v. Mitchell*, 330 U. S. 75, 91 L. ed. 754, are nearly identical insofar as the actual facts of each case is concerned.

Both cases involve actions for injunction and declaratory relief.

Both cases involve the existence of regulations limiting the conduct and prescribing duties of public employees.

The case at bar contains two factual differences which render the instant controversy more nebulous and ill-defined than *United Public Workers v. Mitchell, supra.*

First, in the *United Public Workers* case, supra, the petitioners were advised by the terms of the Hatch Act that violation would result in dismissal from the service; whereas, in the instant case as construed by the State Court of California, the issue of compulsion

by discharge is not presented, and even assuming that it is presented, the respondents do not have power to discharge.

Second, in the *United Public Workers* case, *supra*, this Court was advised of the proposed action of the petitioners and the manner in which the Hatch Act purportedly would concretely and adversely affect them.

In the instant case the desire of petitioners in relation to the Board order of August 26, 1947, is unknown to this court. As a result, this court is unable, upon the record presented, to even advise petitioners unless it assumes a series of hypothetical situations which might apply to all of the individual petitioners.

G. The Nonexistence of Essential Facts to Constitute a Justiciable Case or Controversy is Apparent From the Face of the Record Itself.

It was petitioners who decided when this suit would be filed. At the time suit was filed, petitioners deliberately selected and couched in vague and elusive language the allegations of paragraphs VII to X inclusive of their amended complaints. As we have already seen, the mere existence of the Board order of August 26th does not create in the constitutional sense a case or controversy—it is the legislative enactment plus, and most important, the administrative action taken in furtherance thereof, which defines and limits the judicial case. Nevertheless, in the face of these

principles, the court is advised as to the Civil Service classification, year of acquisition of such status, the national and local union affiliation of each petitioner in the *Parker* case and in the case of *Julia Learned Steiner*, the additional facts of her birthplace and educational background, including the universities attended; yet, by way of contrast, when the crux of the alleged controversy is approached, the court is left to assume its own facts and to guess as to what, if anything, the respondents had done following the adoption of the order of the Board of Supervisors on August 26, 1947.

Even a brief enumeration of the necessary but undisclosed facts which this court is asked to assume for the purpose of its decision is completely persuasive of the hypothetical nature of the petitioners' position.

Petitioners or any of them do not disclose if they have ever been or now are members of any organization which advocates the overthrow of the government by force and violence.

Petitioners or any of them do not disclose if they advocate the overthrow of government by force and violence.

Petitioners or any of them do not disclose if they have ever been or now are members of any or all of the organizations listed in Paragraph "D" of the Oath and Affidavit.

Petitioners or any of them do not disclose for what reason, if any, they will be discharged, if it be presumed that a discharge will occur.

Petitioners or any of them do not disclose for what reason, if any, they will be reported to the Board of Supervisors as subversive and disloyal.

Petitioners or any of them do not disclose for what reason if any they will suffer irreparable injury because of the alleged acts of the respondents.

In addition to these material omissions as to the position of petitioners, this court is further asked to assume that the respondents have taken certain action equally essential to the establishment of a judicial case or controversy.

This court must assume that pursuant to the Board order of August 26, 1947, and before September 3, 1947, the respondents printed and circulated 22,000 oaths and affidavits and did present them for signature to the same 22,000 employees.

This court is further asked to assume that within the same seven days, but without any facts in support thereof, the respondents, and particularly the Committee respondents had a meeting, were advised that some of the petitioners had not signed, and then, as a matter of fact did threaten the petitioners with dismissal.

This court is asked to assume that within the same seven days, but without any facts in support thereof,

the respondents, and particularly the Committee respondents, had a meeting, were advised that the petitioners had indicated membership in organizations which advocated the overthrow of constitutional government by force and violence in Paragraph "B" and marked organizations listed in Paragraph "D". This court is then asked to assume that the committee respondents did threaten petitioners with dismissal.

This court is asked to assume that within the same seven days, but without any facts in support thereof, the Auditor prepared in triplicate, an alphabetical list of 22,000 employees, transmitted these lists to the Registrar of Voters and to the Federal Bureau of Investigation, and still within the same seven days, the Registrar of Voters and the Federal Bureau of Investigation returned the same to the Committee respondents, who thereafter held a meeting, digested all of the reports and then decided, in conjunction with the answers disclosed in the oath and affidavit, that some of the petitioners should be reported to the Board of Supervisors, and further and independently of the report to the Board of Supervisors, did threaten each and all of the petitioners with discharge.

This court has consistently held to a rule that "the burden is on the plaintiff by candid and direct allegations to set forth plainly in its complaint facts sufficiently plain to show the asserted invalidity." *Missouri Pacific Railroad Co. v. Norwood*, 283 U. S. 249, 255; 75 L. Ed. 1010, 1016.

This burden is not met by the allegation of the pleaders' conclusions of law or his opinions and neither of these matters are admitted on demurrer. *Equitable Assurance Society v. Brown,* 213 U. S. 25; 53 L. Ed. 682.

In the language of this Court, "It is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void." *Fletcher v. Peck,* 6 Cranch 87, 125; 3 L. Ed. 162, 175.

In *Chicago and G. T. R. Co. v. Wellman,* 143 U. S. 339, 345; 36 L. Ed. 176, 180 the court said:

> "Our suggestion is only to indicate how easily courts may be misled into doing grievous wrong to the public and how careful they should be to not declare legislative actions unconstitutional upon agreed and general statements and without the fullest disclosure of all material facts."

In conclusion, respondents ask the Court to look through "forms of words to the substance of their (petitioners') complaint" (*Massachusetts v. Mellon,* 262 U. S. 447, 67 L. Ed. 1078) and find as did the state court that all the allegations of petitioners' amended complaints embraced in paragraphs VII through X, inclusive, are vague and insufficient, and are but figments of the imagination of petitioners, and are contrary to and impossible in law.

This court is entitled to objective proof in the form of specific and concrete allegations of fact that an ac-

tual case or controversy exists. This court should not be compelled to determine a constitutional issue upon the purely subjective claim of petitioners that they have been "threatened." To contend otherwise is to deprive the judiciary of its power to determine its jurisdiction and grant to petitioners and all other claimants the perogative to create "cases" and "controversies" where, in fact, none exist.

CONCLUSION

The contention of the petitioners is contrary to the philosophy of government by will of the people. This philosophy is preserved by the application of the First and Fourteenth Amendments, and the Sixth Article of the United States Constitution, together with the implied covenants of petitioners' trust.

Petitioners' contention is simply that the "liberty" guaranteed to them by the Constitution renders them immune from any investigation in relation to the conditions of their public trust.

Petitioners are asking that this Court declare them infallible, and, further, petitioners are asking that they may have unabridged freedom of speech which would enable them to use their positions of public trust to undermine the American theory of government by will of the people.

This Court has declared that freedom of speech includes the right to urge unrest (*Terminiello v. Chicago,*

337 U. S. 1 (preliminary print), 93 L. Ed. (Advanced Opinions) (No. 15) 865) and the right to urge to action (*Abrams v. United States*, 250 U. S. 616, 73 L. Ed. 1173; *Thomas v. Collins*, 323 U. S. 516, 89 L. Ed. 430) Petitioners' contention, reduced to a reality, is that they have the right to hold positions of public trust and simultaneously urge unrest among the very people that they are hired to represent and urge to action the forceful overthrow of the government lawfully chosen by the people.

It is respectfully contended by the respondents that the judgment of the Court below should be affirmed.

Respectfully submitted,

HAROLD W. KENNEDY,
County Counsel,
and
GERALD G. KELLY,
Deputy County Counsel,
Counsel for Respondents.

ROBERT L. TRAPP,
Deputy County Counsel,
Of Counsel.

Appendix

APPENDIX

Exhibit "A"

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

JULIA LEARNED STEINER, Plaintiff, vs. RAYMOND V. DARBY, as Chairman of Board of Supervisors, Los Angeles County; JOHN ANSON FORD, ROGER JESSUP, LEONARD J. ROACH, and WILLIAM A. SMITH, as members of said Board of Supervisors, Defendants.	)	No. 534177

OPINION

The defendant Board of Supervisors on August 26, 1947, ordered each officer and employee under its jurisdiction to:

(1) Execute the following oath: "I, _____, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution and the laws of the State of California against all enemies, foreign and domestic; that I will

bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office or employment on which I am about to enter or am now engaged, so HELP ME GOD."

(2) Execute an affidavit (a) that he does not advocate the overthrow of the government by violence except .....; (b) that he has never used any aliases except .....; (c) that he has never been a member of or supported any of some one hundred forty named organizations except .....

The plaintiff (a civil service employee of this county) seeks an injunction to prevent the defendants from requiring her or any of the county employees similarly situated to take the oath and sign the affidavit. She also seeks declaratory relief. There are before the court defendants' demurrer to the complaint, their motion to strike and plaintiff's order to show cause for a preliminary injunction.

No valid reason has been suggested by plaintiff why county employees who are citizens of the United States and residents of the State of California (as plaintiff alleges she is) should not take the oath of allegiance. In fact, in her opening brief page 27, line 28, she says: "Plaintiff does not complain about the requirement of an oath to faithfully perform her duties in public office." The oath is not substantially dif-

ferent from the oath of office which every elected official is required to and does take.

Our situation is not comparable to that in West Virginia Board of Education vs. Barnett, 319 U. S. 624, where the school authorities attempted to compel all public school children, regardless of their religious beliefs and under penalty of expulsion for non-compliance, to exhibit their loyalty to the United States by saluting the flag. In that case the form of the flag salute was contrary to the religious beliefs of the plaintiff.

As to the affidavit, if any county officer or employee advocates the overthrow of the government by force it is high time this were known. Government Code, Section 18200, provides "a person shall not be knowingly employed by any state agency or court who either directly or indirectly carriers on, advocates, teaches, justifies, aids or abets a program of sabotage, force or violence, sedition or treason against the government of the United States or of this state."

The Constitution contains no provision which gives county employees the right to advocate the overthrow of the government by force. The plaintiff relies strongly on Communist Party v. Peek, 20 Cal. 2d, 536, which holds that the legislature may not deny the Communist Party a place on the ballot. Plaintiff points out that the law in question was a predetermination by the legislature, that the Communist Party ad-

vocates the forceful overthrow of the government and as such it was void. This is a far cry from holding that the Board of Supervisors may not inquire whether a county employee does advocate the overthrow of the government by force.

Plaintiff also relies on Danskin v. San Diego Unified School District, 28 Cal. 2d 536, which held invalid an administrative requirement that a person who wanted to use school buildings for a public meeting had to sign an affidavit that he did not advocate, and that he was not affiliated with any organization which advocated the overthrow of the government by force. The Supreme Court said, page 542, "However reprehensible a legislature may regard certain convictions or affiliations it cannot forbid them if they present 'no clear and present danger that they will bring about the substantive evils' that the legislature has a right to prevent."

Plaintiff would have us believe that the Board of Supervisors may not even inquire whether a public employee advocates the overthrow of the government by force without violating his constitutional rights. The Danskin case does not so hold nor does any case cited by the plaintiff so hold.

Plaintiff's fundamental error lies in her failure to recognize that the entire loyalty program as it now exists is a fact finding inquiry to determine whether any county employee advocates the overthrow of the

government by force. In making such inquiry the Board of Supervisors does not have to stop when an employee answers "no"; it may pursue the inquiry further by asking about membership in specific organizations, not with the idea that such membership will, of itself, operate to discharge the employee but with the idea that membership in any of the named organizations, including membership in the Communist Party, may provide clues for further investigation.

Plaintiff's position is also based on the erroneous assumption that refusal to take the oath and sign the affidavit has been made a ground for discharge. She alleges (Par. IV of the first cause of action of the complaint): " . . . the defendants adopted . . . a so-called 'loyalty program' . . . as a condition of continued employment by said plaintiff . . . " The latter part of this allegation is contrary to the written report adopted by the defendant, copies of which are attached to the complaint marked Exhibits A and B, and which constitute the entire loyalty program to date. The complaint alleges (page 3, line 7), "Said report constitutes the policy of a program of said Board and said defendants." Allegations in the body of a complaint as to the contents of a written instrument, a copy of which is attached thereto, and which allegations are contrary to the terms of that written instrument are surplusage and are to be disregarded. (Washer vs. Bank of America, 21 Cal. 2d 822.) Nor

is the complaint saved by the allegations set forth in paragraph 5 of the first cause of action: "The defendants, through the defendant SMITH, have announced that any employee found to be a Communist or refusing to sign the 'Loyalty oath and affidavit' will be discharged, the statement by the defendant SMITH being, 'Any employee found to be a Communist or refusing to sign the loyalty oath and affidavit will be out—period!'"

Action of the Board of Supervisors is taken only by order, resolution or ordinance passed by a majority of that Board. (Pol. Code, Sec. 4031). No such action of the Board is alleged. If plaintiff indicates within ten days after the order based on this opinion is made that she can amend her complaint to allege that the defendant Board has taken such action I will give her leave to amend. Otherwise I must treat paragraph 5 as surplusage for it is contrary to Exhibits A and B which plaintiff alleges constitute the policy of the defendants. Furthermore, the Board of Supervisors has no power to discharge a civil service employee without a public hearing by the Civil Service Commission. (Los Angeles County Charter, Sec. 34, subsec. 13).

As yet no penalty has been prescribed by the Board of Supervisors for refusal to take the oath or sign the affidavit, nor has any penalty been prescribed for any employee who states he is a member of the Communist Party or any of the other named organizations.

At this point and until the contrary appears we must assume that the Board will not illegally discharge an employee.

Not by any stretch of the imagination am I holding that mere membership in any of the organizations named in the affidavit, without proof that the employee member advocates the overthrow of the government by force, is ground for discharge. Nor am I ruling on the effect of a refusal of an employee to take the oath and sign the affidavit. As to all of these questions this action is premature. Nor can the complaint be saved by the second cause of action which is for declaratory relief. No justiciable controversy has arisen or can arise as to the effect of an employee's refusal to take the oath and sign the affidavit until the defendants have announced what action they will take in case of such refusal. Furthermore, it is inconceivable that there could be anything in plaintiff's affidavit, if signed, which could give rise to such a justiciable controversy because she alleges (Par. I of the first cause of action) that she is not a member of the Communist Party nor of any of the named organizations.

The only possible present controversy is as to the right of the defendants to conduct this fact-finding inquiry. My ruling, stated above, is that the defendants have a right to conduct the loyalty test in its present form. Therefore there is no controversy left which could be decided under the second cause of action.

The demurrer to the complaint is sustained without leave to amend although the court will entertain the application of above mentioned if made. The motion to strike is off calendar. The preliminary injunction is denied.

Dated January 8, 1948.

FRANK G. SWAIN
Judge of Superior Court.